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IN THE

Supreme Court of the United States

No. 681 October Term, 1947

THOMAS VIOLA,

Petitioner

vs.

THE STATE OF OHIO,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO, BRIEF IN SUPPORT OF PETITION, APPENDIX

and

MOTION TO DISPENSE WITH PRINTING OF RECORD

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

To the Honorable, Fred M. Vinson, Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States:

Thomas Viola, Petitioner, respectfully prays that a writ of Certiorari be issued to review the judgment of the Supreme Court of the State of Ohio entered in the above cause on November 19, 1947, affirming the judgment of the Court of Appeals for the 7th Judicial District of the State of Ohio, convicting him of murder in the first degree, with recommendation of life imprisonment.

1. The Record was not printed in the Court Below and Motion is duly filed in this Court to dispense with the printing of the Record on Petition for Certiorari. This Motion is printed as an addendum to this Petition and Brief. References to the original Record bear the designation "R".

OPINIONS BELOW

The Trial Court, the Court of Common Pleas of Trumbull County, Ohio, issued no opinion in this case. The opinion of the Court of Appeals for the 7th Judicial District, Ohio, has not been reported. The decision, without opinion, of the Court Below, the Supreme Court of the State of Ohio, in affirming the judgment of conviction, and in denying defendant's (a) appeal as of right, and (b) motion for leave to appeal, is reported in 75 N. E. (2d) 715.

JURISDICTION

This cause was argued before the Supreme Court of Ohio on November 23, 1947. The opinion and judgment of that Court were entered on November 19, 1947. On that date, the Ohio Supreme Court denied defendant's appeal as of right on the ground that no debatable constitutional questions were involved. On February 16, 1948, this Court, upon consideration of the application of counsel for petitioner, extended the time for filing petition for writ of certiorari in this case to and including March 18, 1948.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925; Title 28, U. S. C. A., Section 344. (See also Rule 38 of the Rules of the United States Supreme Court.)

The questions herein presented were raised in the Trial Court, in the Court of Appeals and in the Supreme Court of Ohio.

SUMMARY STATEMENT OF THE FACTS AND OF THE MATTER INVOLVED

Your petitioner was indicted by the Grand Jury of Trumbull County, State of Ohio on February 14, 1944, charged with the crime of murder in the first degree of one James Mancini on March 24, 1941, upon an indictment based on Ohio General Code, Section 12400, and, after his arrest at Tucson, Arizona in August 1945, was held without bail thereon. To this indictment your petitioner pleaded that he was not guilty.

The case was tried before J. H. Birrell, Judge, and a jury in the Court of Common Pleas of Trumbull County, Ohio. The trial commenced on March 25, 1946, and continued until April 8, 1946. The jury returned a verdict of guilty of murder in the first degree, with a recommendation of mercy. A Motion for New Trial was duly filed in the Trial Court on April 9, 1946 and overruled on April 12, 1946, at which time the defendant was sentenced to the Ohio State penitentiary for life (R. 1514).

An appeal from the said conviction, judgment and sentence was taken to the Court of Appeals, 7th District, Ohio, under the provisions of Ohio General Code, Section 13459-1. On June 6, 1947, the judgment of the Court of Common Pleas was affirmed, many months after the appeal was taken.

An appeal to the Supreme Court of Ohio from the affirmance by the Court of Appeals of said conviction,

judgment and sentence was taken under the provisions of Ohio General Code, Sections 13459-1 and 7. This appeal was filed both as a matter of right, since debatable constitutional questions were involved, and on condition that motion for leave to appeal be granted by the Supreme Court. The Supreme Court, on November 19, 1947, dismissed and denied both requests, stating as to the appeal filed as of right that no debatable constitutional questions were involved. The judgment of the Ohio Supreme Court constitutes a final judgment by the highest court of that State. (*Tumey v. State of Ohio*, 273 U. S. 510, 515; *Hetrick v. Lindsey* (Ohio) 265 U. S. 384).

STATEMENT OF FACTS

About 9:30 o'clock on the night of March 24, 1941, two strangers entered the barroom of the Prime Steak House, situated in Warren, Ohio, walked to the bar, ordered drinks, shot and killed James Mancini, the proprietor, and his nephew, Felix Monfrino, and escaped. Mancini had for many years been engaged in various liquor, gambling and entertainment enterprises in and about Warren, Trumbull County, Ohio (R. 218-222), and had been known as the "boss of the rackets" in Warren (R. 224). The nephew had been associated with his uncle in these enterprises.

Although there were about ten persons in the Steak House barroom (R. 99) at that time, none of them recognized either of the two strangers. The Warren police took a number of the eye witnesses to Pittsburgh and Cleveland for the purpose of identifying the strangers from the Rogues' Gallery of the police departments of those cities. Thereafter, Monfrino's father, and Tony Shiro, known as "Tony the Hawk" or "Tony the Killer", accompanied by Sergeant Johnson of the Warren Police made numerous trips to various cities, San Francisco, Miami, etc., for the purpose of identifying the murderers (R. 157). On two occasions, once at a prize fight at Pittsburgh, and once at a police lineup at Pittsburgh, certain men were mistakenly identified.

Not until December, 1943, did the Warren police have any intimation as to the alleged identity of the strangers. About January 2, 1944, Sergeant Johnson received infor-

mation through an oral tip concerning suspects in connection with these murders (R. 572-575, 599). He was informed that one Charles Monazum and Thomas Viola, your petitioner, were alleged to be involved therein. Monazum was at that time, and is at present, serving a sentence for bank robbery at the Federal Prison at Leavenworth, Kansas. Of the ten eye witnesses at the barroom on March 24, 1941, only three identified pictures shown to them by Sergeant Johnson as that of your petitioner and of Monazum. These included Tony Shiro, an employee and bodyguard of the deceased, Bernard Monfrino, father of one of the victims, and Nofrey Mancini, son of the deceased (R. 72, 73, 261-302). Dicenzo (R. 894-895), Cage (R. 924-925), Harris (R. 1062-1063) and Chalupaka (R. 1133-1135), four of the other eye witnesses to whom the pictures were shown, stated that none of the pictures was that of either of the two strangers involved in the murders.

On August 8, 1945, your petitioner was arrested by the F. B. I. at the Santa Rita Hotel at Tucson, Arizona, on a federal warrant, charging unlawful flight to avoid prosecution. Your petitioner, who had been a patient at a Detroit hospital in December of 1943 and January of 1944, had been instructed by his physician to go to Arizona for his health. The hospital's records confirmed this reason for Petitioner's presence in Tucson.

There was dispute among the witnesses at the trial as to the identification of the witnesses. Three witnesses, Bernard Monfrino, Nofrey Mancini and Tony Shiro identified Viola as the shorter of the two strangers. Dicenzo, Cage and Harris, disinterested witnesses, stated positively that your petitioner was not one of the two strangers at

the Steak House on March 24, 1941—five years before the trial. The other witnesses, Showacre, Mrs. Hernon, Mock and Chalupka stated they were not able to identify the defendant as one of the strangers involved in the murders.

The only other means of identification of your petitioner as one of the strangers was the testimony of Latona, an F. B. I. finger print expert, who testified that a fragment of the left index finger found on one of the whiskey glasses used by one of the strangers was that of the defendant. Although the glasses and the photographic enlargement of the finger print had been sent to the F. B. I. finger print offices on April 4, 1941, no identification had been made at that time. The letter of transmittal which accompanied the glass to the F. B. I. office at Washington on April 4, 1941, referred to "the Old Man" and to "Buffalo Joe", neither of whom was Viola or Monazum, as suspects in these killings (Ex. 4).

George A. Lacy, identification expert on finger prints of Houston, Texas, called as a witness in defense, refuted Latona's identification and was of the opinion that there were not sufficient points of similarity on the shot glasses and whiskey glasses alleged to have been handled by one of the strangers to make a comparison between them and the admitted ink prints of petitioner (R. 1315).

Admission of State's Ex. "U", a letter from J. Edgar Hoover of the F. B. I. dated February 5, 1944, *identifying latent and ink finger prints, deprived defendant of an opportunity to be heard in his defense and to be confronted with and to cross examine witnesses, and of his liberty without due process of law* in violation of the 14th Amendment: Over defendant's repeated objections, the Trial Court ad-

mitted into evidence State's Ex. "U", a letter dated February 5, 1944, from J. Edgar Hoover, chief of the F. B. I., wherein he stated that the latent and ink finger prints were identical (R. 802-803). Mr. Hoover was not a witness at the trial. This objection was renewed in the briefs and at the oral arguments before the Court of Appeals and the Supreme Court of Ohio, on the ground that the admission was in clear violation of defendant's rights under the Constitutions of both the United States and the State of Ohio, and deprived him of his liberty without due process of law by not giving him full opportunity to be heard in his defense.

The giving of additional instructions to the jury in the absence of the accused in violation of his constitutional right under the 14th Amendment to be present at all times during the trial: During their deliberation the jury sent written questions to the Judge. These were: (1) Is the State's Ex. "A-6" (photographic enlargements of the latent and ink prints) evidence or comparison; (2) Should we have evidence at Coroner's inquest? (R. 1466). During Petitioner's enforced absence, by agreement the answer to the second question was: "No" (R. 1465). The Court stated that the answer to the first question was that State's Ex. "A-6" is evidence. However, the Court refused to add to the second answer the following instruction requested by the defense counsel: "And the jury may compare the prints for identification if it so desires" (R. 1465).

The Court stenographer was not present when the jury asked for these additional instructions. Defense counsel agreed that the answers to the questions as delivered by the Court might be written out and sent to the jury in their jury room (R. 1466). The Court, thereafter, considered the

possibility of defense counsel's not having the power to waive defendant's right to be present at the giving of the answers to the questions. The jury was recalled to the jury box and instructed as to the answers to the questions in the presence of the defendant (R. 1467). Within a very short time, the jury returned with its verdict, thus proving that the additional instruction given on this point materially affected the jury's verdict of conviction. The giving of the additional instructions on the first occasion, in the absence of the accused is assigned hereinafter as fundamental and prejudicial error—in violation of defendant's constitutional right to be present at all times during the trial.

Nowhere in the transcript of testimony is there any evidence that defendant had ever been in Warren, Ohio, or that he was acquainted with James Mancini or Felix Monfrino or with any of the witnesses to the homicide, or that he knew Monazum, the other alleged stranger. The only time he was alleged to have been in Warren was on the night of March 24, 1941. No witness testified that he had ever seen Viola in Warren on the night of the killings or prior thereto or subsequent thereto. His alleged presence in Warren was unexplained. The State failed to show any motive on the part of Petitioner for the murders.

QUESTIONS PRESENTED

1. Whether the conviction, which rested principally on the admission of State's Exhibit "U", the letter of J. Edgar Hoover, identifying the latent print on the glasses handled by one of the strangers with that of Petitioner's admitted finger print, is consistent with the due process of law required by the 14th Amendment to the Constitution of the United States. Defendant was not confronted by Mr. Hoover and given an opportunity to be confronted with or to cross examine Mr. Hoover as to the basis for his opinion as to identity. Such procedure deprived your petitioner of an opportunity to be heard in his defense.

2. Whether the giving of additional instructions to the jury in the defendant's absence — although waived by defendant's counsel and thereafter repeated in the presence of the defendant, but not in any manner waived by defendant himself—was consistent with the due process of law required by the 14th Amendment to the Constitution of the United States, especially where the law of the State of Ohio specifically provides that such presence at all stages of the trial cannot be waived.

REASONS FOR ALLOWANCE OF WRIT

1. The admission of State's Ex. "U", the letter from Mr. Hoover, identifying the latent and ink prints, deprived your petitioner of an opportunity to be heard in his defense: to confront and cross-examine Mr. Hoover. The privilege of confrontation and cross-examination is an essential condition of due process under the 14th Amendment to the Federal Constitution, especially where the privilege has long been established by local practice. The admission of this hearsay evidence was so radical and unjust as to work a destruction of fundamental rights and thus a denial of due process.

2. The admission of State's Ex. "U", the letter from Mr. Hoover, identifying the latent and ink finger prints as identical was in clear violation of your petitioner's rights under Section 10, Article I of the Constitution of Ohio and in violation of the 14th Amendment to the United States Constitution and amounted to a *conviction by correspondence.* The right to have opportunity to be heard in defense—especially the right to be confronted with and cross-examine witnesses—is "too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

3. The giving of the additional instructions by the Trial Court in the enforced absence of the defendant was a denial of the right of your petitioner to be present at all stages of the trial, as prescribed in Section 10, Article I of

the Constitution of said State, and Section 13442-10, Ohio General Code, and in violation of Article 14 of the Amendments to the Constitution of the United States.

4. The giving of the additional instructions in the absence of defendants deprived your petitioner of the privilege under the 14th Amendment to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge. The defense would be made easier if the accused had been permitted to be present at the time of giving additional instructions for it would have been in his power if possible to give advice or suggestions or even to supersede his lawyers altogether and to conduct the trial himself:

Snyder v. Commonwealth of Massachusetts, 291 U. S., 97, 54 S. Ct. Rep. 330;

Lewis v. United States, 146 U.S. 370, 13 S. Ct. Rep. 136, 36 L. Ed. 1011.

5. The giving of the additional instructions, in the absence of the defendant, in the light of the long established practice in the Courts of the State of Ohio and in the highest courts of a majority of the States, recognized by Justices of the highest learning and especially acknowledging the right under the law of defendants in capital cases to be personally present at all stages of the trial, was a violation of Sec. 10, Article I of the Ohio Constitution and Sec. 13442-10, Ohio General Code and a violation of Article 14 of the Amendments to the Constitution of the United States. Such trial procedure could not be waived by the accused's counsel, or cured by the repetition of the additional instructions in his presence: see *State v. Grisafulli,* 135 O.S. 87, 19 N.E. (2d) 645.

6. The precise Federal questions of substance herein raised have not been heretofore determined by this Court. These are important questions of Federal law which should be settled by this Court. The questions go to the very essence of a criminal trial and the resolution thereof will vitally affect the administration of justice in criminal cases throughout the Nation.

PRAYER FOR WRIT OF CERTIORARI

Wherefore, your petitioner prays that a Writ of Certiorari issue under the seal of this Court directed to the Supreme Court of the State of Ohio to the end that the constitutional questions and issues herein involved may be reviewed and determined by this Court as provided for by the Statutes of the United States; and that the judgment herein of said Supreme Court of Ohio be reversed by this Court and for such further relief as to this Court may seem meet and proper.

Respectfully submitted,

CHARLES J. MARGIOTTI,

Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. OPINIONS OF COURTS BELOW

The opinion of the Court of Appeals for the 7th Judicial District of the State of Ohio has not been reported. The decision, without Opinion, of the Supreme Court of the State of Ohio, is reported in 76 N. E. (2d) 715.

II. JURISDICTION

1. The date of the final judgment to be reviewed is November 19, 1947. On February 16, 1948, upon consideration of the application of counsel for petitioner, this Court extended the time for filing Petition for Writ of Certiorari in this cause to and including March 18, 1948.

2. The statutory provision which is invoked to sustain the jurisdiction of this Court is Section 237b of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 937 (28 U.S.C.A., Section 344).

3. The constitutional question (a) as to the admission of State's Ex. "U", a letter dated February 5, 1944, from J. Edgar Hoover, Chief of the F. B. I. stating that the latent prints on the glasses handled by one of the strangers and the admitted ink print of your petitioner were identical; and (b) the giving of the additional instructions in the absence of the defendant were raised at the trial and before the Court of Appeals and the Supreme Court of the State of Ohio as involving violations of petitioner's rights under the federal Constitution, 14th Amendment. A letter from the Clerk of the Supreme Court of the State of Ohio, in response to a petition for a certificate of that Court, clarifying its opinion so as to show that the constitutional questions were raised under the United States Constitution, has been deposited with the Clerk of this Court and is attached as an appendix to this Petition for Certiorari.

Jurisdiction

4. The petition is for review of a cause wherein final judgment has been rendered or passed upon by the highest court of a state in which a decision could be had, in which petitioner specifically set up and claimed a right under the Constitution of the United States.

III. STATEMENT OF THE CASE

This has already been stated in the preceding petition (pages 4-10), which is hereby adopted and made a part of this Brief.

IV. SPECIFICATION OF ERRORS TO BE URGED

The Supreme Court of the State of Ohio erred:

1. In denying your petitioner's appeal as of right on the ground that no debatable federal constitutional questions were involved.

2. In failing to hold that the admission of State's Ex. "U", the letter from Mr. Hoover, identifying the latent print on the whiskey glass handled by one of the strangers, and the admitted ink print of your petitioner, without Mr. Hoover's appearance as a witness, was in violation of your petitioner's rights under the 14th Amendment to the United States Constitution, and that such admission, by depriving defendant of the right to confront and cross-examine the writer of said letter, deprived him of an opportunity to be heard in his defense and of liberty without due process of law.

3. In failing to hold that the giving of additional instructions in the absence of your petitioner, although waived by counsel and thereafter repeated in the presence of the defendant, deprived him of his privilege under the 14th Amendment to the United States Constitution to be present at all stages of a trial in a capital case.

4. In affirming the judgment of the Court of Appeals for the 7th Judicial District of Ohio.

V. ARGUMENT

Point I

Due Process of Law under the 14th Amendment Required the Exclusion of State's Ex. "U", a Letter Wherein J. Edgar Hoover, F.B.I. Chief, Identified the Latent Print on the Glasses Handled by One of the Strangers, and the Admitted Ink Print of the Defendant, Because its Admission, Depriving Defendant of the Right to Confront and Cross-examine a Witness Against Him, Was in Violation of His Privilege to Be Given an Opportunity to Be Heard in His Defense.

The admission of State's Exhibit "U", letter dated February 5, 1944, from Mr. Hoover wherein he stated that the latent and ink finger prints were identical, without his appearance as a witness, was in clear violation of the petitioner's rights under the Constitutions of both the United States (14th Amendment) and of the State of Ohio.

The Constitution of the State of Ohio, Article I, Section 10 Trial for Crimes; Witness:

> "* * * In any trial, in any court, the party accused shall be allowed to appear and defend *in person* and with counsel; * * * *to meet the witness face to face* * * * but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance cannot be had at the trial, always

securing to the accused means opportunity *to be present in person* and with counsel at the taking of such deposition, and *to examine the witness face to face* as fully and in the same manner as if in court * * * "

In 12 O. Jur.—Criminal Law—Section 121, the rule excluding testimony of the foregoing nature is thus stated (Pa. 158-159):

"It is a fundamental principle in criminal prosecutions that the accused has the right to meet the witnesses against him face to face. The Constitution of Ohio (Art. I, Sec. 10) guarantees the accused this right in any trial in any court. * * * It has been said that this right is a Constitutional guarantee of a fundamental principle which was well established and long recognized at common law. * * *

In addition to meeting witnesses face to face, the accused has the right to test the qualifications of a witness before he testifies when his competency as a witness is questioned in good faith * * *."

It is fundamental law that the accused person has the right to test the recollection or to search the conscience of a witness, or to compel him to stand face to face with the jury in order that they may observe his expression and demeanor and the manner in which he gives his testimony, and, therefore, to judge his credibility. To permit the present conviction to stand upon evidence such as Exhibit "U" would be tantamount to a *conviction by correspondence*. Justice would not be dispensed by the courts, where all the State would have to do would be to introduce a letter from any person stating that the defendant was guilty of the crime for which he was charged. No reflection

is intended to be cast upon Mr. Hoover, because his experience, ability and reputation are undisputed. But we do not think that even Mr. Hoover intended that the accused should be convicted on the strength of his letter.

The incompetency of this Exhibit "U" was recognized by the Trial Court (R. 802). This incompetency was not cured by reason of the defense counsel having asked questions concerning it during cross-examination. In attempting to secure all the information pertaining to the identification of the prints, counsel was acting within the scope of his duty to uncover as much information as he could in defense of the accused. The cross-examination moreover was centered not around the contents of either Exhibits "U", but around the circumstances under which this letter was dictated. It was ascertained that this letter was dictated by Mr. Noles, and that Mr. Hoover merely signed his signature thereto (R. 702).

There is no doubt that State's Exhibit "U" was the pivotal point of this case. It is only logical to presume that the jurors read into each statement of Latona the fact that it was supported, in all fours, by independent investigation and approved by Mr. Hoover.

The inadmissibility of Exhibit "U" is further seen in the fact that the statement of Mr. Hoover was not based upon any personal examination of the prints by himself, but rather upon the examination and comparison by Mr. Noles (R. 702). Thus, even if Mr. Hoover had been present at the trial of this case and had testified, in substance, to the contents of Exhibit "U", and had admitted that he had not made the examination and comparison himself, his testimony would have been incompetent because

of his lack of personal knowledge of the contents. It was most arbitrary upon the part of the Trial Court to admit his written statement into evidence and to afford to it the weight it carried in the minds of the jurors.

The rule cited by the Court of Appeals in justification of its overruling of this Assignment of Error is not applicable. The Court cited 17 O. Jur., Section 493, p. 600, in justification of its finding. An examination of the rule as therein stated shows that the opposing party is entitled to introduce the entire document only "where the reading of the entire document is necessary to ascertain with certainty its real sense and meaning". No such necessity is seen in this case.

Both the Court of Appeals of Ohio and the State Supreme Court acted under the misapprehension that petitioner's counsel had requested the admission of Exhibit "U" into evidence. The Court of Appeals observed "that in granting his request the trial judge said in substance that since both parties desired its admission in evidence, he would admit such Exhibit, and that Mr. Margiotti then said 'then that is all right as long as we can agree' " (Opinion of the Court of Appeals, page 10).

An examination of the transcript of the testimony in the record certified to this Court will show that petitioner's counsel specifically objected to the admission of State's Exhibit "U" (R. 802), and that his statement as to the admission of an exhibit—"then that is all right as long as we can agree"—was made with reference to State's Exhibit "R", at an earlier stage of the trial, and at a time when State's Exhibit "U" had not yet even been identified (R. 567). State's Exhibit "R" was a letter

from the F. B. I. to the Warren Police, dated April 10, 1941. It first appears in the Record at page 557. Questions with reference to State's Exhibit "R" appear at pages 567 to 570. Petitioner's counsel had originally asked that this letter be admitted into evidence (R. 567) The Court stated that since both sides wanted the letter (Ex. "R") introduced, it would admit the letter (R. 569). It was only with reference to State's Exhibit "R"—and not to State's Exhibit "U", the Exhibit involved in this case—that petitioner's counsel stated, "then that is all right as long as we can agree".

State's Exhibit "U" was first identified at page 593, long after the discussion as to the admissibility as to State's Exhibit "R" had taken place. At page 802, when State's Exhibit "U" was offered in evidence, petitioner's counsel emphatically objected to its admission.

Thus it is readily seen that both the Court of Appeals and the Ohio Supreme Court confused the objections of petitioner's counsel to Exhibits "R" and "U". At no time did petitioner's counsel request the admission of Exhibit "U" into evidence. At no time did petitioner's counsel state to the trial court that he desired the admission of State's Exhibit "U" into evidence. When the Court admitted Exhibit "R" into evidence (R. 570), Mr. Margiotti said, "then that is all right as long as we can agree" solely with reference to Exhibit "R" and not to Exhibit "U". Thus it is submitted that there was no acquiescence on the part of petitioner's counsel in the admission of Exhibit "U".

Thus, in conclusion, it is seen that the State's Exhibit "U" was originally incompetent and prejudicial. Its

appearance for the first time during the cross-examination of the State's witnesses for a limited purpose—the ascertainment of the circumstances under which it was executed—did not cure or render admissible said incompetent Exhibit. The extent to which they prejudiced the accused in the minds of the jurors cannot be computed. Most certainly, the jurors did not believe they were in the position to dispute an absolute and affirmed statement by the Director of the Federal Bureau of Investigation, that the latent print on the glasses and the ink print on the F. B. I. finger print cards were identical. Additional objection to the admission of Exhibit "U" is the fact that therein Mr. Hoover stated, as an ultimate fact, that the finger prints were identical. He stated that " * * * You are advised that, upon comparison, the unidentified latent finger print in this case has been identified with the left index finger impression of Thomas Viola" (1492).

It is submitted, therefore, that the admission of Exhibit "U" resulted in the *conviction of* the accused not based upon competent, relevant and material testimony, but based *upon correspondence*, upon a letter, from Director J. Edgar Hoover to Chief of Police Gillen of the Warren Police Department. The admission of said Exhibit "U" deprived the defendant of a fair trial and of his liberty without due process of law—which he was guaranteed by the Constitution of the United States and of the State of Ohio.

The State of Ohio is free to regulate the procedure of its courts "in accordance with its own conceptions of policy and fairness, unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

"The due process clause of the Fourteenth Amendment requires that action by a state or through any of its agencies, must be consistent with the fundamental principles of liberty and justice which lie at the basis of our civil and political institutions, which are not infrequently designated as the 'law of the land'" (63 S. Ct. 1129, at 1130).

Snyder v. Massachusetts, 291 U.S. 97, 54 S. Ct. 330, 78 L. Ed. 674;

Twining v. New Jersey, 211 U.S. 78, 29 S. Ct. 14, 53 L. Ed., 97;

Maxwell v. Dow, 176 U.S. 581, 20 S. Ct. 448, 44 L. Ed, 597;

Hurtado v. California, 110 U.S. 516, 4 S. Ct. 111, 28 L. Ed., 232;

Frank v. Mangum, (Ga.) (1915), 237 U.S. 309, 35 S. Ct. 582, 59 L. Ed., 969;

Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158;

Lisenba v. California, 314 U.S. 219, 62 S. Ct. 280, 86 L. Ed., . . . ;

Chambers v. Florida, 309 U.S. 227, 60 S. Ct. 472, 84 L. Ed., 716;

Herbert v. Louis, 272 U.S. 312, 316, 47 S. Ct. 103, 104, 71 L. Ed., 270;

Buchalter v. New York, 319 U.S. 427, 63 S. Ct. 1129, 87 L. Ed., 1492;

Lyons v. Oklahoma, 322 U.S. 596, 64 S. Ct. 1208, 88 L. Ed., 1481.

Hysler v. Florida, 315 U.S. 411, 62 S. Ct. 688, 86 L. Ed. 932;

Brown v. Mississippi, 297 U. S. 278, 56 S. Ct. 461, 80 L. Ed., 682;

Palko v. Connecticut, 302 U.S. 319, 58 S. Ct. 149;

Cantwell v. Connecticut, 310 U.S. 296, 60 S. Ct. 899;

Malinski v. New York, 324 U.S. 401, 65 S. Ct. 781.

Although it is admitted that the State's procedure does not run foul of the 14th Amendment because another method may seem to our thinking to be fairer or wiser, or to give a surer promise of protection to the prisoner at the bar (i.e. consistent with that Amendment, trial by jury may be abolished; indictments by a grand jury may give way to informations by a public officer; the privilege against self-incrimination may be withdrawn and the accused put on the stand as a witness for the State) nevertheless, what may not be taken away is notice of the charge and an *adequate opportunity to be heard in defense of it.* This error was such as to deprive petitioner of a trial according to the accepted course of legal proceedings. *See Twining v. New Jersey, supra, Powell v. Alabama, supra,* pages 68, 71 of 287 U.S. 53.

In *Snyder v. Massachusetts, supra,* 291 U.S. 97, at page 106 Mr. Justice Cardozo stated:

> "* * *Thus, the privilege to confront one's accusers and cross-examine them face to face is assured to a defendant by the Sixth Amendment in prosecutions in the Federal courts (Gaines v. Washington, supra at

page 85 of 277 U.S., 48 S. Ct. 468, 72 L. Ed. 793) and in prosecutions in the state courts is assured very often by the Constitutions of the states. For present purposes we assume that the privilege is enforced by the 14th Amendment, though this has not been squarely held" (citing cases).

It is admitted that erroneous rulings on evidence by a state court do not constitute a denial of due process. However, in this case the admission of the hearsay letter of Mr. Hoover, without his having been called as a witness against the accused, deprived him of an opportunity to confront the witness to cross-examine him, to be heard in his own defense and thereby deprived him of his liberty without due process of law. The right to a fair trial is protected by the 14th Amendment. *Adamson v. California,* 332 U.S. 46, 67 S. Ct. 1672.

The prosecution's contention that the defense counsel's action—in having inquired as to the correspondence between the F. B. I. and the Warren police, in having been given State's Exhibit "U" together with other letters, and in having made inquiries concerning the authentication of the glasses,—rendered such letter admissible in evidence, proceeds upon a misconception of the nature of petitioner's complaint. That complaint is not of the commission of mere error, but of a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void. They were void for want of essential elements of due process, and the proceeding thus vitiated could be challenged in any appropriate manner. It was challenged before the Trial Court, the Court of Appeals and the Supreme Court of the State by the invocation of the 14th Amendment. The

Supreme Court of Ohio refused to entertain the challenge, stating that no debatable constitutional questions were involved, and thus declined to enforce petitioner's constitutional rights. The Court thus denied a Federal right fully established and specially set up and claimed, and therefore for this reason alone the judgment must be reviewed.

The mere fact that questions were asked concerning the aforesaid correspondence did not constitute a waiver of the initial incompetency and the inadmissibility of said letter. In *Brown v. Mississippi,* 297 U.S. 278, it was held that the failure of counsel for defendant, who had objected to the admissibility of confessions, to move for their exclusion after they had been introduced and after a fact of coercion in obtaining the confessions had been proved, did not preclude reliance on the erroneous admission of the confession to obtain reversal since the conviction and sentence were void for want of essential elements of due process.

Although it is admitted that the 14th Amendment is not to be taken as embodying the provisions of the 5th and 6th Amendments, and that there is no general rule that whatever would be a violation of the original bill of rights (Amendments 1 to 8) if done by the Federal Government is now equally unlawful by force of the 14th Amendment if done by a state, nevertheless *certain privileges and immunities* which are valid as against the Federal Government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the 14th Amendment, became valid as against the states: See *Palko v. Connecticut,* 302 U.S. 319, at page 326.

In *Twining v. New Jersey*, 211 U. S. 78 at page 99, 29 S. Ct. 14, 19, 63 L. Ed. 97, this Court stated:

> "It is possible that some of the personal rights safeguarded by the first eight Amendments against national action may also be safeguarded against state action, because denial of them would be a denial of due process of law. Chicago, Burlington & Quincy Railroad Company v. Chicago, 166 U.S. 226, 17 S. Ct. 581, 41 L. Ed. 979. If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law."

The fundamental basis to the conception of due process is that the hearing must be a real one, not a sham or pretense. *If a conviction is permitted to stand on the strength of a letter from a man of Mr. Hoover's reputation, integrity and standing, then the protection of the 14th Amendment's due process clause is meaningless.* The opportunity to be confronted with the author of this letter, to cross-examine him, and through such cross-examination to be given an opportunity to be heard in his own defense, was essential to the substance of a fair hearing. This is one of the privileges and immunities that have been taken over from the earlier articles of the Federal Bill of Rights and brought within the 14th Amendment by a process of absorption. Although the right to confront witnesses and cross-examine them was in its origin effective under the 6th Amendment against the Federal Government alone the 14th Amendment has absorbed them. The process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed. (See Warren,

the New Liberty under the 14th Amendment, 39 Harvard Law Review 43). In *Betts v. Brady,* 316 U.S. 455, it was held that the 6th Amendment of the National Constitution applies only to trials in Federal Courts; and that the due process clause of the 14th Amendment does not incorporate as such the specific guarantees found in the 6th Amendment. However, this Court there stated that a denial by a state of rights or privileges specifically embodied in the 6th Amendment and others of the first eight Amendments may, in certain circumstances, or in connection with other elements operate, in a given case, to deprive a litigant of due process of law in violation of the 14th Amendment.

The following language of Mr. Justice Roberts, at 316 U.S. 462 is pertinent:

> "Its application (14th Amendment) is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial. In the application of such a concept there is always danger of falling into the habit of formulating the guarantee into a set of hard and fast rules the application of which in a given case may be to ignore the qualifying factors therein disclosed."

The criminal proceedings which resulted in petitioner's conviction deprived him of the due process of law by which he was constitutionally entitled to have his guilt determined.

State's Exhibit "U", letter from Mr. Hoover, having been admitted as an Exhibit, was used by the prosecuting attorney during his oral argument to the jury. After his Charge, the Court permitted this letter to go out with the jurors and to be considered by them during their deliberations. The jurors, with this letter before them, must have read into the letter the magnificent performances by Mr. Hoover and the F. B. I. in criminal detection. World War II was still vivid in the minds of the jurors. Without doubt, the verdict must have been based principally on this ex parte statement rather than upon the oral testimony at the trial.

Therefore, it is submitted that the violation of the principles of the 6th Amendment as to confrontation of witnesses and cross-examination in this capital case, at least, is violative of the due process clause of the 14th Amendment. As stated by Rutlege, J., in *Application of Yamashita*, 327 U.S. 1, at page 44:

> "It is outside our basic scheme to condemn men without giving reasonable opportunity for preparing a defense. * * * In capital and other serious offenses to convict on official documents and on hearsay, once or twice removed, more particularly when the documentary evidence or some of it is prepared ex parte by the prosecuting authority and includes not only opinions but conclusions of guilt. Nor in such cases do we deny the rights of confrontation of witnesses and cross-examination.

Point II

Due Process of Law under the 14th Amendment Required the Presence of Petitioner When the Trial Court Gave Additional Instructions to the Jury.

The judicial Act of Judge Birrell at the trial in the Common Pleas Court in giving the additional instructions to the jury in the absence of the defendant, deprived petitioner of the protection of the 14th Amendment in that the presence of the defendant was necessary to the fundamental conception of due process of law:

Powell v. Alabama, 287 U.S. 45.

In *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, at 105, this Court ruled:

> "We assume in aid of the petitioner that in a prosecution for a felony the defendant has the privilege under the Fourteenth Amendment to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge."

Certainly a defendant's personal presence in a capital case whenever any additional instructions are given has "a relation reasonably substantial to the fulness of his opportunity to defend against the charge." At that time it was in his power, if possible "to give advice or suggest or even to supersede his lawyers altogether and conduct the trial himself". The question of the weight to be given

to State's Exhibit "G" (the photographic enlargements of the latent and ink prints) was one of the pivotal points in this case. *The accused's presence at the time of the disposition of any issue thereon was as essential as his personal presence at the time of the reception of the evidence or at the time of the Court's Charge to the jury.*

It is recognized in *Snyder v. Massachusetts*, 291 U.S. 97, at 119 that cases relating to the procedure **at a view** are not to be confused with cases where the defendant was absent during the examination of witnesses or the Charge of the Judge.

The fundamental right in importance of personal presence of an accused at a criminal trial, particularly in capital cases, has been stressed by judicial expression whenever occasion has arisen. This court has said:

In *Lewis v. United States*, 146 U.S. 370, 372:

> "A leading principle that pervades the entire law of criminal proceedings is that after indictment is found, nothing shall be done in the absence of the prisoner."

And in *Hopt v. Utah*, 110 U.S. 574, 578, 579:

> "His (the prisoner's) life or liberty may depend upon the aid which by his personal presence, he may give to counsel and the court and triers. The necessity of the defense may not be made by the presence of his counsel only".

In *Schwab v. Bergren*, 143 U.S. 444, 448:

> "The personal presence of the accused from the beginning to the end of a trial for felony involving life

or liberty, as well as the time final judgment is rendered against him, may be and must be assumed to be vital to the proper conduct of his defense, and cannot be dispensed with".

This principle has its roots in the earlier history of the common law: See *Rex v. Ladsingham,* Sir T. Raymond Reports, 193 (1682).

In 1 *Cooley, Constitutional Limitations* (8th Edition), page 667, the authority states:

> "In cases of felony when the prisoner's life or liberty is in peril, he has the right to be present and must be present during the whole of the trial and until the final judgment."

See 1 *Bishop, New Crim. Proc.* (2nd Edition), Sec. 273.

In *French v. State,* 84 Wis. 400, 411, the Court said:

> "These great common law requirements have been made constitutional provisions in the various states, and so made essential and paramount, and also indispensable in trials for capital offenses and felonies. It is not too strict to hold that in all such cases the accused must be present in court to meet the witnesses face to face. * * * These are great constitutional safeguards against oppression and in justice they must not be abridged or compromised."

As stated in 23 *C.J.S.*—Criminal Law—Section 973—Presence of Accused, at pages 303-304:

> "In the absence of a permissible waiver, see Sec. 975a infra, under constitutional or statutory provisions

to that effect and at common law, an accused charged with a felony is entitled to be present, and, for a valid trial and conviction, must be present, at every stage of the trial, or at least when any important or substantive step is taken. While this rule is regarded in most jurisdictions as essentially for the benefit of accused, it has been held in other jurisdictions that *the rule is for the benefit of the state as well as accused,* and that accused's presence during the trial is essential to the jurisdiction of the court." (Italics ours)

In 23 *C.J.S.*—Criminal Law—Section 974—Particular Stages of Prosecution, instructions; communications with jury after retirement at page 306:

"Accused must be present during the argument and determination of the instructions to be given the jury. * * * A written instruction, after it has been delivered and the jury have retired, should not be corrected in the absence of accused. * * * Unless there has been a permissible waiver, accused must be present when the court charges the jury, or when, after their retirement, they are given additional instructions. * * * Accused must be present when there is any communication between the judge and the jury, after their retirement, and his absence at such time is ordinarily reversible error."

In 23 *C.J.S.*—Criminal Law—Section 975—Waiver at pages 309-310:

"In general, the right to be present during the trial of an indictment for felony cannot be waived by accused in a capital case."

At page 311 as to who may waive the right to be present:

> "Who may waive. It is generally held that a waiver of accused's right to be present during the trial, when permitted, must be made by him personally, and that the right cannot be waived by his counsel unless accused authorizes him so to do."

Accord: 14 Am. Jur.—Criminal Law—Sec. 189 and 190, at pages 899 to 900, the rule is thus stated:

> "In capital cases, and in fact in all charges of felony, whether the defendant is in custody or on bail, after indictment returned or information filed, nothing may be done by the court in the case unless the accused is personally present. In a capital case, the rule holds good even after the accused has pleaded guilty.
>
> The right to be present extends to every part of the trial proper. The defendant should be present on arraignment in felony cases, when evidence is given, when the jury is charged, when the court communicates with the jury in answering questions by them, when the jury receives further instructions, when the verdict is returned, and when evidence is introduced for the purpose of determining the amount of punishment to be imposed."

The following cases show that the personal presence of a defendant at all stages of a capital case is a necessary part of due process:

Sneed v. State, 5 Ark. 431, 41 Am. Dec. 102;

State v. Vanella, 40 Mont. 326, 106 P. 364, 20 Ann. Cas. 398;

State v. Kelly, 97 N.C. 404, 2 S.E. 185, 2 Am. St. Rep. 299;

State v. Jenkins, 84 N.C. 812, 37 Am. Rep. 643;

State v. Hensley, 75 Ohio St. 255, 79 N.E. 462, 9 L.R.A. (N.S.) 277, 116 Am. St. Rep. 734, 9 Ann. Cas. 108;

Com. v. Corsino, 261 Pa. 593, 104 A. 739, citing R. C. L.;

State v. Atkinson, 40 S.C. 363, 18 S.E. 1021, 42 Am. St. Rep. 877;

Stoddard v. State, 132 Wis. 520, 112 N.W. 453, 13 Ann. Cas. 1211.

In *Shields v. United States,* 273 U.S. 583, 47 S. Ct. 478 71 L. Ed. 787, it was held:

"It is reversible error for the trial judge in a criminal case to respond in writing, in the absence of the accused and his counsel, and without giving them an opportunity to be heard, to a written request by the jury for further instructions.

"A joint request by the prosecuting attorney and counsel for the accused made in the chambers of the judge without the presence of the accused, to hold the jury in deliberation until they should agree upon a verdict, does not justify communications by the court to the jury in the absence of the accused and his counsel, when the jury indicates a divergence of views with respect to the guilt of the several defendants."

Accord: *Diaz v. United States,* 223 U.S. 442, 32 S. Ct. 250 56 L. Ed. 500.

Argument

The accused has the right to be present when the Court charges the jury and this right extends to each and every instruction given the jury as to the law of the case: in 12 *O. Jur.*—Criminal Law—Section 115, page 50, it is stated:

> "* * * Where the jury on the trial of a felony have retired to consider their verdict, it is error for the Court, on the return of the jury into court, to again instruct them as to the law of the case in the absence of the accused, who was then in jail under Order of the Court, and such irregularity is not cured by the presence of the counsel of the accused at the time the additional instruction is given and his failure to make objection. If this right is denied the accused by reason of his imprisonment by Order of Court, it will be presumed that he was prejudiced thereby, and that without inquiry as to the correctness of instruction given in his absence."

It is submitted that the accused herein had a right to be present at all times during the course of the trial when anything was said or done affecting him, and that the giving of additional instructions in his absence was a violation of this right, affording a ground for new trial. The giving of these instructions in the absence of the defendant was a violation of his privilege to be present at every stage of the trial. The fact that jury was recalled and the additional instructions repeated in the presence of the accused does not cure the violation of his constitutional right to be present at all stages of the trial. It is presumed that he was prejudiced by the giving of the instructions on the first occasion in his absence. If such irregularity is not cured by the presence of the counsel of the accused at the time the

additional instructions are given and his failure to make an objection *(Kirk v. State,* 14 O. 511), it most certainly is not cured by repetition of the additional instructions in his presence.

Another objection to the giving of the additional instructions was the refusal of the Trial Judge to add to the answer of Request No. 1 that the jury "may compare the prints for identification if it so desires". The question submitted was "Is the State's Exhibit A-6 evidence or comparison?" The Court answered "No", and refused to add the requested additional instructions to the Answer. It is submitted that the Court committed fundamental error in refusing to permit the jury to make a comparison of the prints for identification if it so desired. After all, it is Hornbook law that the jurors are the final arbitrators of the facts, even though expert witnesses have testified one way or the other. By refusing to give additional instructions as requested by defense counsel, the Court again reinforced Latona's testimony and again gave it the effect of being an ultimate fact rather than merely an opinion. The jury was entitled to disregard the evidence of Mr. Latona in reaching its conclusion. They were not required to find in accordance with the opinion of this expert.

The Court of Appeals did not mention and apparently disregarded the leading case of *State v. Grisafulli,* 135 O.S. 87, 19 N.E. (2d) 645, in reaching its conclusion at page 31 of the Opinion by holding that:

> " * * * Under the law and the evidence in this case, defense counsel, by his action in consenting that the Trial Judge should send instructions to the jury in the first instance, and failing to object to his reinstructing

it in open court thereafter, waived any error that might have been committed in the first instance, and that no constitutional right of defendant was waived by any of the named acts of his counsel or omissions to act on their part. * * * We reached the conclusion that the interest of the defendant was not prejudicially affected by what the Court did during defendant's absence, as hereinbefore set forth herein. If the Trial Judge erred in refusing to properly instruct the jury, as defense counsel contends he did, it was their duty to object, which, as stated, they failed to do."

There is an unanimity of view among most jurisdictions in accord with the principal laid down in *State v. Grisafulli, supra:* See cases cited in 23 C. J. S. Criminal Law, Section 973, Presence of Accused at pages 303-304; Section 974, at page 306. Also: 14 Am. Jur. Criminal Law, Sections 189 and 190, at pages 899 to 900.

The right of personal presence comes within the pale of "an immutable principle of justice, which is the inalienable process of every citizen of a free government:"

Twining v. N. J., 211 U.S. 78, 113.

"* * * and which no member of the union may disregard"

Holden v. Hardy, 169 U.S. 366, 389.

The serious handicap of a prisoner charged with a capital offense in the conduct of his defense and in assisting counsel, by reason of the custody and restraint incident to a capital case has been judicially noticed in the leading case of *Diaz v. United States*, 223 U.S. 442, 455.

Argument

All the fundamental safeguards of the criminal law against oppression and justice rest upon broad grounds of fair play. They are not to be confused by technical interpretation or to be sacrificed or made to yield to mere temporary expediency or more expeditious processes of trying cases: *Tumey v. Ohio,* 273 U.S. 510; 47 S. Ct. 437.

Due process comprehends a fair and just hearing and a full and adequate opportunity for defense. Such protection to be more than meaningless pretense must assure an accused whose life is imperiled by judicial process to see through his own eyes, hear through his own ears and to act through his own powers of reasoning, not infrequently his best means of establishing innocence. No one can be substituted to exercise these faculties for him, against his will, when he chooses to personally exercise this acknowledged prerogative.

The mere repetition of the additional instructions in the defendant's presence did not cure the violation of his constitutional prerogative, as stated in *State v. Grisafulli,* page 648.

Under *State v. Grisafulli,* the initial giving of the additional instructions in defendant's absence, even though waived by his counsel, was presumed prejudicial and reversible error. The repetition thereafter in his presence did not cure the harm that had been caused originally. Where error occurred which, within the range of a reasonable possibility might have affected the verdict of a jury, defendant is not and should not be required to explore the minds of the jurors in an effort to prove that it did in fact influence their verdict. So to hold would as a practical matter take from the defendant his right to a fair trial.

In this case we know nothing of what went on when the additional instructions were received and read in the jury room. It is entirely possible that the manner in which they were read was misinterpreted. Emphasis plays an important role in transmission of ideas by word of mouth. What else may have occurred when the additional instructions were read we do not know. No outsider has any business in the jury room. Much harm could result, and that is enough to warrant a holding that such prejudicial error—in violation of the defendant's constitutional right—could not have been cured.

The protection of Section 10, Article I of the Ohio Constitution and Sec. 13442-10 Ohio General Code as to the requirement that the accused be personally present in felony cases are but declaratory of the common law and are found generally in all state constitutions.

In *State v. Grisafulli, supra*, it was held:

> "Section 10, Article I of the Ohio Constitution, a part of the Bill of Rights, provides substantially that in any trial for a felony, an accused shall be allowed to appear and defend in person and with counsel. And Section 13442-10, General Code, states in effect that no person indicted for a felony shall be tried if he is not personally present, unless he escape or forfeit his recognizance after the jury is sworn. * * * A question very similar to the one presented by the instant case was before this court in Jones v. State, 26 Ohio St. 208. The per curiam opinion is short and reads:
>
> 'We are unanimously of opinion, that on the trial of a felony it is error to proceed, at any stage of the trial, during the enforced absence of the accused, save

only in the matter of the secret deliberations of the jury, and perhaps in the hearing of motions after verdict and before judgment.

'It was the *right* of the plaintiff in error *to be present at each and every instruction given to the jury as to the law of the case.* This right was denied to him by reason of his imprisonment under the order of the court; and without inquiry as to the correctness of the instructions so given in his absence, *it will be presumed that he was prejudiced thereby.* (Italics ours.)

'Nor was the irregularity cured by the presence of his counsel at the time the additional instruction was given, and his failure to make objections. The right of the accused to be present on the trial of such case cannot be waived by counsel.

'Judgment reversed and new trial granted.'

The holding in Jones v. State, supra, corresponds with the weight of authority. See Shields v. United States, 273 U.S. 583, 47 S. Ct. 478, 71 L. Ed. 787'' (and other cases).

As is well stated in *State v. Grisafulli,* 19 N.E. (2d) 645 at 648:

''This country is still devoted to the ideals of democracy under which the legal rights of every individual must be recognized and protected. Among these rights is the inherent privilege of one accused of the commission of a felony to be present in person at every stage of his actual trial.''

According to *Powell v. Alabama, supra,* the protection of the due process clause includes within the right of

opportunity of being heard whatever is necessary to assure to the accused, regardless of the merits of the case, all the protection essential to the fundamental conception of a fair and just trial.

No construction of any Ohio statute is involved in the case of petitioner. Ohio statutes have never deprived defendants in felony cases of their right to be present at a trial. In fact, both the Ohio Constitution and Statutes require the personal appearance of an accused in a felony case. For that reason the cases of *Hurtado v. California*, 110 U.S. 516; *Maxwell v. Dow*, 176 U.S. 581; and *Holden v. Hardy*, 169 U.S. 366; and *Twining v. N. J.*, 211 U.S. 78, 111, do not apply. In fact it is contended—although not pertinent to this case—that limitations do exist upon legislative powers of the states under the 14th Amendment in dispensing with the personal presence of an accused at a capital trial. See remark of Mr. Justice Moody in *Twining v. New Jersey, supra*, at page 99.

Thus, the law of Ohio upon the right of a defendant to be present in a capital case at the giving of the additional instructions is not open for argument so far as this case is concerned. See *State v. Grizafulli, supra.*

A most fundamental requirement of a fair and just trial at common law and under constitutional and statutory provisions is the necessity of the personal presence of an accused in a capital case at every stage of the trial. And under the decision of *Powell v. Alabama*, 287 U. S. 45 (1932) the protection of the due process clause of the Fourteenth Amendment includes this fundamental right within the right of a fair opportunity of being heard.

Thus, it is submitted that due process of law required the presence of the petitioner at the time the trial Court gave the additional instructions to the jury, and that this privilege could not be waived by his counsel, nor cured by the repetition thereof thereafter in his presence.

The jury returned with its verdict within a very short time after the additional instructions were repeated in petitioner's presence. This latter fact shows the tremendous effect of these instructions on the jury's verdict. The prejudice caused by his original absence was immeasureable and incurable by its subsequent repetition.

CONCLUSION

The foregoing federal questions were especially set up and claimed and brought to the attention of the Court at every stage orally, and particularly in the Briefs filed on behalf of the petitioner in the Court of Appeals and in the Supreme Court of Ohio, and by oral argument in said courts.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that rights under the Constitution of the United States be preserved, and that to such an end a Writ of Certiorari should be granted, and this Court should review the judgment of the Supreme Court of Ohio and finally reverse it.

Respectfully submitted,

CHARLES J. MARGIOTTI,

Attorney for Petitioner.

APPENDIX

STATE OF OHIO

OFFICE OF CLERK OF THE SUPREME COURT

Columbus 15, Ohio

February 26, 1948

Mr. Charles J. Margiotti
Attorney at Law
720 Grant Bldg.
Pittsburgh, Pa. (19)

In re: Case No. 31216

Thomas Viola -vs- State of Ohio

Dear Sir:

Your letter of the 19th inst. was received some days ago and referred to the Court, together with your petition for a certificate of this Court clarifying opinion. Your letter and the petition have been returned to the Clerk's Office and I am directed to advise you that the Court decided not to amend its judgment entry or to sign a certificate as desired by you.

The Chief Justice stated that the Journal Entry correctly states the views of the Court to the effect that no debatable constitutional question was involved and that this includes both the state and the federal constitution and amendments thereto.

Letter dated Feb. 26, 1948

The Chief Justice also stated that your briefs presented in this Court will show what constitutional questions were raised by you.

Yours very truly,
(s) Seba H. Miller
Clerk

shm/is

MOTION TO DISPENSE WITH PRINTING OF THE RECORD ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

To The Honorable Fred M. Vinson, Chief Justice, And To The Associate Justices Of The Supreme Court Of The United States:

Comes now the petitioner, Thomas Viola, by his attorney, Charles J. Margiotti, and respectfully moves your Honorable Court to permit the petitioner to proceed with his petition for writ of certiorari seeking a review of the Judgment of the Court Below, the Supreme Court of the State of Ohio, without being required to print the record in the said cause.

In support of said Motion your petitioner avers:

1. Judgment was entered on November 19, 1947 in the Supreme Court of the State of Ohio and constitutes a final judgment of the highest court of that State. On February 16, 1948, this Court granted petitioner an extension until to and including March 18, 1948 within which to present a petition for writ of Certiorari in this case. The petition for writ of certiorari must be filed not later than March 18, 1948.

2. The record was not printed in either the Court of Appeals for the 7th Judicial District of Ohio or in the Supreme Court of said State for the reason that the procedural statutes of that State permitted the parties to proceed on the typewritten transcript and original exhibits.

3. That the testimony of this case amounted to approximately 1500 pages. In addition there were approximately 50 Exhibits in the case.

4. That your petitioner, since the date of his conviction, May, 1946, has been imprisoned at the Ohio State Penitentiary at Columbus, Ohio, and had been a prisoner at the Trumbull County Ohio jail between September 1945 and March 1946. That he is without funds to print the record, and particularly the transcript of the testimony in this case.

5. Accordingly, in order that the consideration of the petition for writ of certiorari, to be herewith filed, may be had during the present term of your Honorable Court, the petitioner files this Motion, seeking leave to proceed on the typewritten transcript and original Exhibits.

Wherefore, the premises having been duly considered, it is respectfully prayed that leave be granted the petitioner to file a petition for writ of certiorari on the typewritten transcript and original Exhibits as embodied in the original record certified to this Honorable Court by the Clerk of the Supreme Court of the State of Ohio.

Respectfully submitted,

CHARLES J. MARGIOTTI,
720 Grant Building,
Pittsburgh, Pennsylvania.

INDEX.

CITATIONS.

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 681.

THOMAS VIOLA, *Petitioner*,

v.

THE STATE OF OHIO.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Ohio

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BRIEF FOR THE STATE OF OHIO IN OPPOSITION.

OPINIONS BELOW.

The per curiam opinion of the Supreme Court of the State of Ohio (R. 95) [1] is reported at 75 N. E. 2d 715. The

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[1] The clerk of the Supreme Court of Ohio has certified to this Court the original record of the proceedings in the trial court and in the Court of Appeals for the Seventh Judicial District of Ohio. References to this record will be designated "R." Petitioner has also lodged with the Clerk of this Court the certified original transcript of the testimony. References to the transcript will be designated "Tr." There has also been lodged with the Clerk of this Court under separate cover a certified copy of the pleadings and journal entries in the Supreme Court of the State of Ohio.

opinion of the Court of Appeals for the Seventh Judicial District of Ohio, printed as an Appendix to this brief, is not yet reported.

JURISDICTION.

The judgment of the Supreme Court of the State of Ohio was entered November 19, 1947 (R. 94, 95). On February 16, 1948, Mr. Justice Reed extended to March 18, 1948, petitioner's time to file a petition for a writ of certiorari, and the petition was filed March 18, 1948. The jurisdiction of this Court is conferred by Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

Whether petitioner's rights under the due process clause of the Fourteenth Amendment were violated:

1. By the admission in evidence for the State of a letter from the Director of the Federal Bureau of Investigation, who was not a witness at the trial, after petitioner's attorney had read a portion of the letter during his cross-examination of a witness for the State;

2. By the giving of additional instructions to the jury in petitioner's absence, though with the consent of his attorney, when the same instructions were repeated to the jury in petitioner's presence.

STATEMENT.

On February 14, 1944, an indictment was filed against petitioner in the Court of Common Pleas of Trumbull County, charging him with the deliberate and premeditated murder of one James Mancini (R. 5, 21). After a jury trial lasting from March 25, 1946, to April 8, 1946, petitioner was convicted as charged, but with a recommendation of mercy, and on April 12, 1946, he was sentenced to imprisonment for life (R. 6-8, 12-17, 71, 75; Tr. 1467). On September 11, 1947, the Court of Appeals for the Seventh

Judicial District, after carefully reviewing numerous assignments of error, including the weight of the evidence, affirmed the judgment of the trial court (R. 1-2, 88-90, 97-99; see Appendix, *infra*, pp. 12-38). On November 19, 1947, the Supreme Court of the State of Ohio dismissed petitioner's appeal as of right on the ground that no debatable constitutional question was involved (R. 95). At the same time, the Supreme Court denied a motion by petitioner for leave to appeal (R. 94).

The facts pertinent to the questions presented by the petition for a writ of certiorari are set forth in the Argument, *infra*.

ARGUMENT.

I.

Petitioner's first contention (Pet. 12, 20, 21-33) involves the admission in evidence of a letter from J. Edgar Hoover, Director of the Federal Bureau of Investigation, to the Chief of Police of Warren, Ohio. Petitioner argues that, since Mr. Hoover was not present at the trial, he was deprived of his right to be confronted with the witnesses against him, and consequently deprived of his liberty without due process of law.

It may be conceded that the right of a defendant in a state criminal trial to be confronted with the witnesses against him is a privilege guaranteed in a general way by the due process clause of the Fourteenth Amendment. See *In re William Oliver*, No. 215, this Term, decided March 8, 1948, slip opinion, pp. 15-20. But whatever the extent of that protection, we have no doubt that an independent investigation of the circumstances of this case,[2] will convince that petitioner was accorded a fair and impartial trial.

The facts are simple. Mancini was shot and killed in cold blood in his restaurant in Warren, Ohio, on the night

[2] See *Haley* v. *Ohio*, 332 U. S. 596, 599; *Fay* v. *New York*, 332 U. S. 261, 272.

of March 24, 1941 (Tr. 60-64, 189-200, 867-875). None of the eight or ten eyewitnesses had ever seen either of the two murderers before. One of the two left a print of one finger on a whiskey glass (Tr. 205-207, 420-422, 450-451, 504-506). The local police took the print to Washington for identification by the Federal Bureau of Investigation (Tr. 454-455). By a letter (Exhibit R) dated April 10, 1941, signed by J. Edgar Hoover, Director, the Bureau notified the Warren police that the print could not be identified.[3] (Tr. 544-546, 567-570, 1489). In January 1944, the Warren police, acting on a tip, asked the Bureau whether the single print could be identified as petitioner's (Tr. 571-574, 659-660, 705-706, 1494). On February 5, 1944, the Bureau, over Mr. Hoover's signature, sent the letter (Exhibit U) which petitioner now complains was admitted in evidence in violation of his constitutional rights (Tr. 1492). It contained the following sentence:

> * * * you are advised that, upon comparison, the unidentified latent fingerprint in this case has been identified with the left index finger impression of Thomas Viola.

At the trial, the first reference to this correspondence was made by petitioner's own attorney. At the outset of its case the State, after establishing the corpus delicti (Tr. 9-14), presented three eyewitnesses—Bernard Monfrino, Anthony Shiro and Nofrey Mancini—who identified petitioner as one of the murderers (Tr. 74-75, 195, 302-303).

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[3] Latona, the F. B. I. fingerprint expert who testified for the State, explained that the Bureau maintains a general file containing millions of prints, and also a Single Print File containing approximately 16,000 single prints of persons convicted of bank robbery, extortion and kidnapping. In April 1941, the general file contained petitioner's full fingerprints, but the Single Print File did not. Latona explained that it would be physically impossible to search through the general file to identify a single print with nothing more than the print itself to go on. (Tr. 656-658, 783-784.)

Shiro also testified that immediately after the shooting he put a dry towel over the glasses from which the murderers had just been drinking (Tr. 205-207). The State next showed through the testimony of Agent Tickle of the Federal Bureau of Investigation, that petitioner attempted flight when he was arrested (Tr. 360-361). Three members of the Warren Police Department then testified that they had found the glasses on the scene; that they had examined them for prints; and that they had taken them to the Federal Bureau of Investigation in Washington for identification of the prints found (Tr. 420, 454, 505). The first mention of the correspondence between the Bureau and the Warren police was made by petitioner's attorney during cross-examination of these witnesses (Tr. 475). Evidently hoping to show that the State had good cause to suspect some other persons of the crime, counsel demanded that the correspondence be made available to him, asked the witnesses repeated questions about it, read to the witness Johnson, a Warren police officer, excerpts from the Bureau's letter of April 10, 1941, and even sought to introduce that letter as part of his own case (Tr. 475-476, 543-546, 553-570, 591-592). Finally, petitioner's counsel specifically asked Johnson for the letter of February 5, 1944, Exhibit U, and it was handed to him by the witness (Tr. 592-593).

Later, after Latona, a fingerprint expert of the Federal Bureau of Investigation, had testified for the State that the print on the whiskey glass was petitioner's, defense counsel questioned him repeatedly about the correspondence between the Bureau and the Warren police. During the course of this questioning, counsel developed from the witness that such letters and reports from the Bureau were prepared by the employee who made the investigation, and were merely approved and signed by the Director without independent investigation (Tr. 690-691), and that in this particular case, the letters were written by a Bureau employee named Noles, who had made the comparison of the prints on which the letter of February 5, 1944, was based

(Tr. 702, 750). Finally, petitioner's attorney *read to the witness in the hearing of the jury the very sentence* from the letter of February 5, 1944, quoted above, which he now contends was so damaging, being careful to develop immediately from Latona that the letter had been prepared by Noles (Tr. 771-772).

At the close of its case, the State offered, among other exhibits, the Bureau's letters of April 10, 1941, and February 5, 1944. The following then transpired (Tr. 801-802):

> Mr. McLain [Assistant Prosecuting Attorney]: We offer State's Exhibit R the letter of April 10 [1941], is there any objection.
>
> Mr. Margiotti: Yes, I object to it as being generally incompetent, irrelevant and immaterial.
>
> Court: The letter, State's Exhibit R * * * will be admitted in evidence because of the great amount of reference and reading, referring to that letter and the reading from that letter which already has gone into evidence.
>
> Mr. Margiotti: Note exception.
>
> * * * * * *
>
> Mr. McLain: * * * We offer State's Exhibit U the letter of February 5th [1944] from J. Edgar Hoover to Chief Gillen.
>
> Mr. Margiotti: I make some [same?] objection.[4]
>
> Court: The letter may be admitted by reason of the fact that it has been partially read on cross-examination.
>
> Mr. Margiotti: Note exception please.

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[4] The petition speaks of "repeated" (Pet. 8) and "emphatic" (Pet. 25) objections to Exhibit U. The objection quoted in the text was, so far as the record shows, the only one made at the trial, and it was a general one. If, as petitioner now insists (Pet. 24), there was no necessity for introducing the whole of Exhibit U, he should have made his objection clear when the letter was offered. Moreover, the objection that the admission of the letter violated petitioner's rights under the Fourteenth Amendment was raised for the first time in the Supreme Court of Ohio.

We think it is obvious from these facts that there was no error, much less a violation of petitioner's constitutional rights. We do not see how petitioner can possibly have any basis for complaint when his own attorney first brought the contents of Exhibit U to the jury's attention in cross-examining the State's witnesses and in doing so developed the fact that Mr. Hoover had made no personal investigation of the prints. Although the letter would have been subject to objection if first introduced by the State, there is no doubt that the right of confrontation may be waived by defendant in a criminal trial. *Diaz* v. *United States*, 223 U. S. 442, 449-453; *Gonzalez* v. *People of Virgin Islands*, 109 F. 2d 215, 217 (C. C. A. 3); *Fukunaga* v. *Territory of Hawaii*, 33 F. 2d 396 (C. C. A. 9), certiorari denied, 280 U. S. 593; *Grove* v. *United States*, 3 F. 2d 965, 966-967 (C. C. A. 4), certiorari denied, 268 U. S. 691. And the objection was waived when petitioner's attorney read part of the letter to the witness,[5] for it is well settled that when one party has introduced a part of a conversation or document, the other party may introduce the remainder so far as it is relevant, as was the case here.[6] *Carver* v. *United States*, 164 U. S. 694, 697; *Affronti* v. *United States*, 145 F. 2d 3, 7 (C. C. A. 8); *United States* v. *Rollnick*, 91 F. 2d 911, 918 (C. C. A. 2); *Vause* v. *United States*, 53 F. 2d 346, 351-352 (C. C. A. 2), certiorari denied, 284 U. S. 661; *Pandolfo* v. *United States*, 286 Fed. 8 (C. C. A. 7), certiorari denied, 261 U. S. 621; *Emanuel* v. *United States*, 196 Fed. 317, 322 (C. C. A. 2); 7 Wigmore, *Evidence* (3rd ed. 1940) § 2113.

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[5] That this constituted introduction of a portion of the letter in evidence, see *Lombard* v. *Chaplin*, 98 Me. 309, 56 A. 903. The petition does not adequately present the picture in stating that the cross-examination was centered, not around the contents of the exhibits, but around the circumstances under which the letters were dictated (Pet. 23).

[6] The right "to be confronted with the witnesses" was never intended, of course, to do away with recognized exceptions to the hearsay rule. See *Kirby* v. *United States*, 174 U. S. 47, 61.

It should also be pointed out that the petition exaggerates out of all proportion the part Exhibit U actually played in the case. The State relied upon the identification of petitioner by the three eyewitnesses—Monfrino (Tr. 52-76), Shiro (Tr. 187-214) and Nofrey Mancini (Tr. 286-303)—and upon the testimony of Latona, the F. B. I. fingerprint expert, who identified the print on the whiskey glass as petitioner's (Tr. 631-660).[7] Exhibit U added nothing to Latona's expert testimony. At the time the exhibit was admitted, the jury already knew from Latona's testimony that he was an F. B. I. fingerprint expert, and they also knew from defense counsel's examination of Latona on cross that the F. B. I. had identified the print as petitioner's in 1944 and had so advised the Warren police by a letter signed in the name of the Director. Defense counsel had also carefully developed in his examination of Latona that the letter had been prepared by Noles, the expert who made the original comparison. Furthermore, the State did not adduce and made no point of Exhibit U in the examination of any of its witnesses; and the exhibit was given only passing notice in the State's long summation (Tr. 1387-1437, see 1428-1429), while the name of Mr. Hoover was not even mentioned. And since petitioner's attorney carefully destroyed any effect the prestige of Mr. Hoover's name might have had in the minds of the jury by showing that he did not personally investigate the fingerprint or prepare the letter, we think it is clear that the letter, even if erroneously admitted, played little or no part in the trial. Petitioner injected the correspondence into the trial in the apparent hope of gaining some advantage, and his present argument appears to be a "mere afterthought." See *Johnson* v. *United States,* 318 U. S. 189, 201.

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[7] Latona was on the stand for cross-examination for several hours (see Tr. 660-775, 786-795).

II.

Petitioner also asserts a violation of the Fourteenth Amendment in that the trial court gave additional instructions to the jury in his absence (Pet. 34-47). Again we concede that under the due process clause the defendant in a capital case has the right "to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge," *Snyder* v. *Massachusetts*, 291 U. S. 97, 105, and that this right may extend to the giving of additional instructions. But here again, we submit that an investigation of the record reveals no violation of constitutional right.

After the jury had been deliberating for some time, two written questions were sent out to the judge asking whether State's Exhibit A-6 (photographic enlargements of the fingerprints in evidence) was "evidence or comparison," and whether the jury should have the transcript of the coroner's inquest, which had been used by both sides in cross-examining witnesses. Petitioner was not present in the court room at the moment, though his attorney was. After a conference between the court and counsel for both sides, the court decided to instruct the jury that the exhibit was evidence[8] and that they could not have the transcript of the coroner's inquest. Defense counsel then agreed that the court might write out these additional instructions and send them to the jury without the necessity of calling petitioner back into the court room.[9] Shortly

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[8] Petitioner contends (Pet. 41) that the court erred in not qualifying this instruction by telling the jury that they could compare the prints for identification if they so desired. But conceding, *arguendo*, that this was a mistake, it was at worst an erroneous instruction and not a violation of constitutional right.

[9] Such a waiver by counsel is consonant with "due process" under the Fourteenth Amendment. *Frank* v. *Mangum*, 237 U. S. 309, 338-343; *Howard* v. *Kentucky*, 200 U. S. 164, 175. Ohio law, however, does not permit such a waiver (*State* v. *Grisafulli*, 19 N. E. 2d 645, 135 O. S. 87), and we make no point of it here.

thereafter, the court, realizing that under Ohio law counsel has not power to waive the presence of a defendant in a felony case, recalled the jury to the box at 10:20 p. m. and in the presence of petitioner repeated the instructions previously submitted to them in writing. Neither petitioner nor his counsel made any objection to this proceeding. The jury again retired and at 11:20 p. m.[10] returned with its verdict (Tr. 1464-1467).

"So far as the Fourteenth Amendment is concerned, the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *Snyder* v. *Massachusetts, supra,* at 107-108. We think it is manifest that petitioner was not deprived of a fair and just trial by the incident of which he now complains. As the petition points out (Pet. 34-35), the purpose of the privilege is to enable the defendant to advise his counsel on the disposition of any issue and if necessary to supersede him and conduct the trial himself. Clearly, petitioner was afforded this opportunity by the repetition of the instructions in his presence.

Petitioner insists (Pet. 40) that a presumption of prejudice arises when the court takes any action at the trial in the absence of the defendant. The presumption is rebutted, however, where, as here, it is clear from the record that no injury was suffered. *Compagna* v. *United States,* 146 F. 2d 524, 528 (C. C. A. 2), certiorari denied, 324 U. S. 867; *Ray* v. *United States,* 114 F. 2d 508, 513 (C. C. A. 8), certiorari denied, 311 U. S. 709; *United States* v. *Graham,* 102 F. 2d 436, 444 (C. C. A. 2), certiorari denied, 307 U. S. 643; *Outlaw* v. *United States,* 81 F. 2d 805, 808-809 (C. C. A. 5), certiorari denied, 298 U. S. 665; *Dodge* v. *United States,* 258 Fed. 300, 303-305 (C. C. A. 2), certiorari denied, 250 U. S. 660; *Dill* v. *People,* 29 P. 2d 1035, 94 Colo. 230, cer-

[10] We are unable to follow the logic of petitioner's suggestion that prejudice is proved because "within a very short time, the jury returned with its verdict" (Pet. 10, 47).

tiorari denied, 292 U. S. 609; *Morris* v. *State,* 170 S. E. 217, 219, 177 Ga. 365; *Gray* v. *Commonwealth,* 70 S. W. 2d 970, 254 Ky. 1; *Edmonds* v. *Commonwealth,* 264 S. W. 1100, 1104, 204 Ky. 495; *State* v. *Nardarella,* 154 Atl. 834, 835-837, 108 N. J. L. 148.

The Court of Appeals for the Seventh Judicial District properly declined to be controlled by *State* v. *Grisafulli,* 19 N. E. 2d 645, 135 O. S. 87, upon which petitioner places so much reliance (Pet. 41-46). That case held that under Ohio law the defendant's right to be present when the instructions are given cannot be waived; but nothing was done there to cure the attempted waiver. Here the attempted waiver was obviously cured in ample time. Cf. *Canizio* v. *New York,* 327 U. S. 82. The Supreme Court of the State of Ohio thus logically found no debatable constitutional issue.

No objection was made at the time the instructions were repeated that petitioner had been prejudiced. And no objection based on the Fourteenth Amendment was made in the Ohio appellate courts. Here again, we think the contention is in the nature of an "afterthought" developed from a meticulous search of the record for error.

CONCLUSION.

No substantial question involving denial of a federal constitutional right is presented in this case. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

PAUL J. REAGEN,
Prosecuting Attorney,

WILLIAM M. McLAIN,
Assistant Prosecuting Attorney,
Trumbull County, Ohio,
Warren, Ohio.

April, 1948.

APPENDIX.

State of Ohio, Trumbull County
In the Court of Appeals
Seventh District

Case No. 1147

THE STATE OF OHIO
Plaintiff-Appellee,

vs.

THOMAS VIOLA,
Defendant-Appellant.

Appearances

Paul J. Reagen, Prosecuting Attorney, William M. McLain, First Assistant Prosecuting Attorney, Warren, Ohio, for Plaintiff-Appellee.

Charles J. Margiotti, Pittsburgh, Pennsylvania, and W. W. Pierson, Warren, Ohio, for Defendant-Appellant.

Hon. William M. Carter,
Hon. Elmer T. Phillips,
Hon. John C. Nichols, *JJ.*

Grace Marten,
Court of Appeals Reporter,
Mahoning County Court House,
Youngstown, Ohio.

Phillips, *J.*

Defendant, Thomas Viola, was indicted by the grand jury of Trumbull County on the fourteenth day of Febru-

ary, 1944, for the murder of James Mancini upon an indictmen laid under Section 12400, General Code, which provides:

> "Murder in the first degree. Whoever, purposely, and either of deliberate and premeditated malice, or by means of poison, or in perpetrating or attempting to perpetrate rape, arson, robbery or burglary, kills another is guilty of murder in the first degree and shall be punished by death unless the jury trying the accused recommend mercy, in which case the punishment shall be imprisonment in the penitentiary during life."

A jury in the court of common pleas of such county found defendant guilty of murder in the first degree, recommended mercy, and a life sentence was imposed. Defendant appealed from that judgment on questions of law.

Reference will be made to the parties here as they stood there, the State of Ohio as the State and Viola as Defendant.

James Mancini was shot "through the heart" about 9:30 o'clock on the night of March 24, 1941, in the barroom of the Prime Steak House, situated in Warren, Ohio, and, as the coroner of Trumbull County testified, died of "internal hemorrhages from" such "bullet wound".

Defendant was apprehended by the Federal Bureau of Investigation on August 8, 1945, in Tucson, Arizona, where there is evidence he went to benefit his health, impaired by "gonorrheal arthritis", "gastric ulcer and hypertrophy of the pyloric muscle" from which he was suffering, and arrested on a warrant charging unlawful flight to avoid prosecution, issued upon information furnished by a sergeant of the police department of Warren, Ohio, who was confidentially informed he had killed Mancini.

Mancini's son testified that he met Viola face to face just outside the Prime Steak House shortly after his father was killed, at a place which was lighted brightly; and he and two other eye witnesses to Mancini's murder identified defendant upon trial in the common pleas court as

his murderer; and one of the state's witnesses testified defendant "was still pumping shots into him" after Mancini was shot three times.

A latent finger print of a left index finger found on a drinking glass identified as used by defendant just before Mancini was shot, which was in size "about half of a penny" and represented "at least eighty percent" of the finger print of the owner and one "almost the size of a quarter" found on another glass, and those of the bartender on duty at that time were compared by the Federal Bureau of Investigation and found to be identical with those of the defendant and bartender.

Defendant did not testify in the court of common pleas, but there is evidence he had admitted previously that he had been "tipped off" that the hotel in which he was in Tucson, when apprehended and arrested, was surrounded by agents of the Federal Bureau of Investigation, one of whom he recognized, who testified in the trial court that while leaving such hotel, upon seeing him and the other agents and officers, defendant attempted to flee.

Two of defendant's witnesses, one an admitted "numbers operator" and the other a confessed "gambler" ("that is my business"), one of whom stated after the shooting he couldn't identify anyone, and the other that he couldn't identify the defendant or the other man who was with him when he entered the Prime Steak House, testified that they "didn't see much of anything", "didn't pay any attention to the killers", except that they ordered "Haig and Haig", and that "defendant was not one of the two men".

The bartender, who served defendant, and whose fingerprints were found on the drinking glass on which the print of defendant's left index finger was likewise found, testified for defendant that he was "positively not" the man who killed Mancini.

One of defendant's witnesses testified he couldn't identify anyone except Mancini's son as present in the Prime Steak House when the person, or persons, who shot his father were fleeing.

Another of defendant's witnesses testified that she did not recall seeing any person in the barroom when Mancini was shot, except "Mr. Huffman" with whom she was talking.

A third defense witness, who said he was a fingerprint, handwriting and firearms identification expert, and who admitted on cross examination he was found guilty on twelve counts of inefficiency by the Civil Service Commission of Houston, Texas, and discharged from the police force of that city for that reason, testified he could not establish a positive identification between the ink print of defendant's left index finger and the latent print on the glass because the latter was not sufficiently clear. However he did not testify that in his opinion the two prints were not the same.

Briefly such is the evidence upon which the case proceeded to trial in the court of common pleas to which, together with the other testimony and evidence introduced there, reference will be made in detail in disposing of the numerous assigned grounds of error.

The trial judge did not err to defendant's prejudice in refusing to strike from the record the testimony of the agent of the Federal Bureau of Investigation, to whose testimony reference has been made, relative to defendant's attempted flight at the time he was apprehended in Tucson, Arizona, where he was known as Sam Lavigne; nor in striking from the record the cross examination of one of defendant's witnesses relative to defendant's residence, employment and relationship to and association with certain persons of uncertain occupations; nor "in permitting the state's cross examination of the defendant's witness

Sailor relative to defendant's residence and employment and to his relation to Jake Lerner and Lieutenant Syracuse''; on the urged grounds that there is no evidence indicating defendant's attempt to flee from the arresting officers, and on the ground that his association with such persons had no bearing on the case, and that the most the state could show was ''not that Viola had committed any offenses during his residence in Tucson, Arizona, but might have committed some offenses.''

There is properly admitted evidence in the record that as defendant, together with a party of friends, left the hotel where he was apprehended and arrested at about 1:15 o'clock on the morning of his arrest, he walked to the west door of the hotel, saw the armed officers standing outside, and then immediately ran or walked hurriedly through the lobby of the hotel to the north door thereof, where he was arrested. Testimony or evidence of flight, resistance to arrest, concealment of identity, assumption of a false name, and related conduct are admissible as evidence of consciousness of guilt. See Wigmore on Evidence, Volume 2, Topics 273 and 276, pages 106, et seq., and cases cited thereunder.

While we find no error prejudicial to defendant in this assigned ground of error we cannot, and do not, condone trying cases by innuendo by asking questions of which there is no direct proof.

Federal Bureau of Investigation agent Latona, who qualified as an expert in finger print comparison, and to whose testimony reference is made heretofore, in testifying with reference to the fingerprint on the drinking glass compared by him being identical with the ink fingerprint of defendant said:

> ''* * * I arrived at the conclusion that the finger which made the impressions appearing on State's Exhibit A-3 encircled in blue with a check mark, and also same finger which made the finger impressions appear-

ing on State's Exhibit 'S' and the impressions which is designated as 7 the index finger, and no other finger made the impressions or could have made it."

Counsel for defendant contend that such testimony was testimony of an ultimate fact, and that the trial judge erred in permitting witness Latona to thus testify.

It is clear to us that in testifying thus witness Latona was merely stating his opinion, and not testifying to the ultimate fact of the guilt or innocence of defendant. It is observed that no objection was made or saved to such claimed incompetent testimony.

Counsel for defendant contends that the admission of State's witness Latona that the Federal Bureau of Investigation "in my opinion * * * is recognized as being the world's authority on prints" constituted prejudicial error for the reason that "this question was not in issue and placed upon defendant the impossible burden of proving that the F.B.I. erred in identifying the latent and ink prints."

Witness Latona qualified as an expert of many years experience in fingerprint comparison, and we believe no error prejudicial to defendant intervened in permitting him to testify that "in my opinion the Federal Bureau of Investigation is recognized as being the World's Authority on prints", from his experience with the Bureau for "fourteen years and three months".

The trial judge permitted defendant's witness Fournier to testify on cross examination as to the circumstances surrounding defendant's departure from an apartment which he was occupying, after his conference with the Police Department of the City of Youngstown, Ohio, and in answer to the question "would you say that these people moved hurriedly or normally" to testify "they moved out, I would say, in a hurry".

We find no error intervened to the prejudice of defendant as claimed in any of the subdivisions of this assigned ground of error.

As suggested heretofore, the evidence discloses that one of the drinking glasses admitted in evidence as State's Exhibits M and N bore the fingerprint marks of defendant and the bartender on duty at the Prime Steak House when Mancini was killed. There is evidence that an eye witness instantly took possession of the glasses "two shot glasses and two rinse glasses" after Mancini was killed, and gave them to a police officer of Warren, who immediately delivered them to a captain of the Police Department of that city (where State's Exhibit M "was dated 3/25/41"), who in turn delivered them to the Superintendent of the Bureau of Investigation of that department; that immediately upon receipt thereof the latter dusted such glasses for the purpose of preserving any fingerprints thereon, and thereafter lodged them with the Prosecuting Attorney of Trumbull County, Ohio, in whose possession after they had been examined by the Federal Bureau of Investigation in Washington, D. C., they remained until the time of trial in the court of common pleas.

Upon all the evidence properly submitted to the jury on this phase of this case we can not agree with the contention of defense counsel that "there was insufficient foundation for the admission into evidence" of such exhibits "for the purpose of the comparison of the latent prints thereon with the ink prints of the defendant", nor that "the court erred in admitting State's Exhibits A-4 and A-5, photographs of latent prints on Exhibits M and N, taken under Latona's direction." Further it is observed that counsel for defendant did not object or except to the admission of the last named exhibits into evidence.

Defendant's counsel next contend that "the trial court erred in admitting Exhibits F and H, pictures of the body of the deceased, James Mancini, when the question of his

death was undisputed, and the purpose of the introduction thereof was to prejudice the jurors against the accused"; and "in admitting state's Exhibit D, the clothing of James Mancini, and sending said clothing out to the jury together with the other exhibits, for the reason that said exhibit was inflammatory".

Photographs are always admissible for the purpose of illustration, and are not inadmissible merely because shocking, horrible or tending to arouse passion or prejudice. See Underhill's Criminal Evidence, Fourth Edition, Page 161. The admission of Mancini's clothing was admissible for the purpose of showing how many bullets entered his body as shown by the bullet holes in such clothing. The record discloses that defense counsel Margiotti interposed an objection to the introduction of the clothing in evidence, and made inquiry concerning "the purpose of offering the clothing", to which the prosecutor responded "to substantiate the bullet puncture through the coat and to substantiate the coroner's testimony"; and that thereupon defense counsel Margiotti said "if that's your purpose we have no objection".

In the next two subdivisions of assigned ground of error number two defense counsel contend that "the court erred in admitting state's exhibit 'R', a letter from the F. B. I., dated April 10, 1941, because it was introduced without the letter of transmittal mentioned therein", and "in admitting state's Exhibit 'U', a letter from J. Edgar Hoover of the Federal Bureau of Investigation to Chief Gillen, dated February 5, 1944, wherein Mr. Hoover, who was not a witness at the trial, stated in effect that the latent and ink fingerprints were identical", for the reasons that "it is a fundamental principle in criminal prosecutions that the accused has the right to meet the witnesses against him face to face".

In admitting State's Exhibit "R", which was also identified as defendant's Exhibit 2, the trial judge stated that

he was admitting such exhibit in evidence because defense counsel Margiotti had not only had it marked as his Exhibit 2 but had read from it, and referred to it numerous times, which statement is supported by the record, and accordingly the contents of the letter having been placed before the jury by the act of defense counsel Margiotti himself he overruled the latter's objection to the introduction of such exhibit on that urged ground and because it was urged it was generally incompetent, irrelevant and immaterial. Basing our conclusions upon a careful reading of the record with reference to this assigned ground of error and an equally careful study of the law applicable thereto we can not say that the trial judge erred in admitting Exhibit "R" in evidence under such circumstances.

With reference to defendant's complaint concerning the admission of Exhibit "U" it is observed that defense counsel Margiotti requested the admission of this exhibit into evidence, and that in granting his request the trial judge said in substance that since both parties desired its admission in evidence he would admit such exhibit, and that Mr. Margiotti then said "then that is all right as long as we can agree".

In other words, the view the trial judge apparently took with reference to both of these letters was that where any writing had been partially read and offered in evidence, the jury, on demand of opposing party, became entitled to examine the entire writing. In that event it became proper for the jury to see and examine the entire document from which counsel had offered any substantial portion. See 17 Ohio Jurisprudence, Article 493, Page 600; 10 R. C. L. Article 288, Page 1088; 20 American Jurisprudence, Article 914, Pages 770, 771. It appears to be the law that the rule announced in the foregoing authorities applies the same in criminal as in civil cases. See Bevington v. State, 2 Ohio St. 160; 49 L. R. A. 542; State v. Smith (La.), 81 Southern 320; State v. Thomas, 156 S. E. 169 at 172.

Considering the record presented to us for review we conclude that the trial judge did not err in any of the respects or upon any of the grounds urged by counsel for defendant in this assigned ground of error.

Counsel for defendant next contend that the trial judge "erred in the exclusion of certain competent, relevant and material testimony" in seven specific instances, each of which we will dispose of separately.

It is claimed by the defendant that the trial judge should have compelled Sergeant Johnson to divulge, upon cross examination by defendant's counsel, the name of his informant whose information led to defendant's apprehension. Wigmore on Evidence, Volume 8, Paragraphs 2374, et seq., Pages 751, 752 and 756, to which counsel for the respective parties are respectfully referred, supports the court's ruling on that claimed error. We can think of no good reason why the arresting authority should be compelled to divulge the source of its information. To compel the arresting authority to do so would tend to cause persons possessing valuable information concerning crimes committed to conceal it from the proper authorities for fear of personal harm or unwanted publicity.

Counsel for defendant further contend that the trial judge erred in limiting the cross examination of state's witness Latona, to whom reference has been made heretofore herein. Upon cross examination of this witness defense counsel Margiotti insisted he assume that he made a mistake, "let's say there is a mistake in any one of those twelve points" of identification of defendant's fingerprint on the drinking glass, to which reference has been made already herein, which the witness refused to do by saying "I don't see how I could assume I have made a mistake". After an exhaustive cross examination of this witness as shown by the record, and which judging by the length thereof and the time it took to read his testimony must have consumed seven or eight hours, the trial judge limited cross

examination for the purpose of avoiding repetition and ruled:

> "This witness answered your question to the best of his ability, and I don't think that the Court is bound to order him to say something which he doesn't believe that he should say, so I think the question therefore has been answered."

We have read the cross examination of witness Latona and arrived at the conclusion that the trial judge allowed counsel for defendant full and complete opportunity and time to examine him about anything and everything relative to his findings, and observe that after counsel for defendant had complained of the limited time allowed by the trial court for such cross examination the trial judge allowed him to further cross examine the witness exhaustively and at great length.

The next of the series of seven complaints with reference to the exclusion of competent evidence is that the trial judge erred "in excluding testimony by defendant's witness, Sailor, in denial of Tickle's testimony that Sailor was sitting in an automobile across from the Tucson Hotel".

Defense counsel Margiotti propounded the following question and the trial judge ruled on it as set forth herein:

> "Q. Now I propose to ask this witness (Sailor) this question: Mr. Tickle has testified that at the time Viola went toward the west door, was going toward the west door, he could see this witness in an automobile sitting in an automobile, and that he was not at the west door I now want to ask the witness whether he was in a car at that time.
>
> "Court:
>
> This is direct examination. You have no right to either lead the witness nor to repeat what any previous witness said or which you think he may have said in your direct questioning of any witness."

The trial judge did not err in this ruling in the respects claimed in this subdivision of this assigned ground of error.

Counsel for defendant attempted to introduce testimony that he had cooperated with the Police Department of Tucson in preventing a jail break in that city while he was confined there awaiting extradition to Ohio, for the purpose of showing his good character, and "that the defendant cooperated with the police authorities, and that he would not have been likely to have fled from the scene of a crime".

We agree wih the statement made by counsel for the state by brief that "there is no rule of law by which a defendant on trial can, through witnesses, introduce good deeds of his life, which have no bearing on the case. This sort of testimony is limited entirely to a summation of the total character of the defendant and then through witnesses, who are in a position over a period of time, to have apprised themselves of the general conduct of defendant"; and hold that the trial judge did not err "in excluding testimony offered by defendant, that he had cooperated in the prevention of a jail break while he was in the Tucson Jail".

The trial judge refused to permit defense witness DiCenzo who testified that defendant "wasn't the man" who killed Mancini, to answer the following question propounded to him on direct examination by defense counsel as to whether he had heard Mancini's son state that one of the two men who entered the barroom of the Prime Steak House just before Mancini was killed say to the other, "Tom, this way":

> "Q. Did you hear him say that night, or any other time thereafter, except here in Court, that he had heard one man say to the other one, 'Tom, this way'."

Counsel for defendant contend this question "was competent, relevant and material", and that the trial judge erred in refusing to permit DiCenzo to answer it. We believe not.

Upon direct examination defendant's witnesses Rich and Bango attempted to testify that defense counsel Margiotti had conversed with Bernard Monfrino on October 8, 1945, with reference to Mancini's murder, which Monfrino denied, which testimony was offered for the alleged "purpose of contradicting Mr. Monfrino's testimony". The trial judge admitted the testimony of these witnesses concerning the occurrence of such conversation, but refused to permit them to testify concerning the nature of that conversation, which counsel for defendant dictated into the record. We believe that the trial judge erroneously refused to permit these witnesses to testify as to the nature of such conversation, but that considering all of the evidence in this case his refusal did not constitute error justifying a reversal of this case on that ground.

Lastly under the assigned ground of exclusion of claimed proper testimony or evidence counsel for defendant contend that "the court erred, on direct examination of Dr. Hull and Dr. Jacob, optometrists, in excluding testimony relative to the condition of Bernard Monfrino's eyes, on the theory of privileged communication".

In a statement dictated into the record by defense counsel Margiotti it is apparent that he intended to show by the testimony of these witnesses that Bernard Monfrino wore bifocal glasses in 1935, ostensibly for the purpose of showing he could not see clearly on March 24, 1941, and that there was some evidence that when examined by witness Jacob in April, 1945, he was suffering from cataract, a recognized eye disease, which men of their profession are prohibited by statute from treating for the reason that their practice is limited by Section 1295-21, General Code, to the

examination of human eyes for the purpose of ascertaining departure from the normal measuring and functional powers.

The trial judge did not err in excluding the testimony of witnesses Hull and Jacobs, though as claimed, but not determined by us, the reason assigned by him for excluding might have been founded upon an improper basis. Testimony as to the condition of Monfrino's eyes as revealed by an examination made by witness Jacob in April, 1945, probably would not reflect the condition of his eyes on March 24, 1941, and for that reason alone would not be admissible. Such testimony was too remote to be valuable in this case.

If optometrist witnesses are held to be physicians and competent to testify concerning disease, if any, of Monfrino's eyes or eye, certainly the confidential relationship existing between Monfrino, who did not give the witnesses permission to testify concerning such condition, and witnesses Hull and Jacob is and should be protected by the provisions of Section 11494, General Code, which prohibit them from disclosing communications or facts relating to the condition of his eyes without his consent.

In assigned ground of error number four counsel for defendant contend that the trial judge "erred in the exclusion of certain exhibits offered in behalf of the defendant, that were competent, relevant and material"; "in excluding from evidence defendant's Exhibit No. 10, 1937 F. B. I. Bulletin on Finger Prints"; and "in refusing to admit into evidence a certified copy of the record of the reversal of the conviction of defendant of the offense of counterfeiting".

Defendant's excluded Exhibit No. 10 is an informative pamphlet on fingerprints and fingerprinting generally, excerpts from which were read to the jury, and which was offered by defense counsel for the purpose of refuting the testimony of state witness Latona, who explained that the

rule laid down therein nine years ago by Dr. Locard, an early French fingerprint authority, that twelve identical points were necessary in the comparison of latent and ink prints was not longer followed by the Federal Bureau of Investigation; and testified "today there's no rule or policy in the F. B. I. to the effect that it takes twelve points or any specific number of points to make an identification", as the science of fingerprinting and comparison had developed during that period, and other factors had become of dominant importance.

Witness Latona did not deny the existence of such a pamphlet or the contents thereof, and testified, from state's Exhibit A-6, that there were twelve points of similarity between defendant's left index finger and those found on a drinking glass submitted to the Federal Bureau of Investigation for comparison, and that there were several other points of similarity which he did not deem it necessary to chart; and on cross examination testified that "there were seven" "points of comparison" on the smaller glass, which were a sufficient number for identification as he "felt twelve would be sufficient for the purpose of demonstration".

As a result of a careful study of this subdivision of the assigned ground of error under discussion, we conclude that the trial judge did not commit prejudicial or reversible error in excluding the proffered exhibit on the ground that it did not refute anything and that by its exclusion "the only impression left from reading the testimony of Latona is that there was only one method of comparing prints, and that was the one he used in making the comparison for the purpose of this trial", and that defendant was not "deprived of a fair trial".

The trial judge admitted into evidence State's Exhibit A-3, an identification card of the ink fingerprints of defendant made in 1934, at a time when he was prosecuted

for and convicted in the United States District Court of Michigan of the offense of counterfeiting, for the purpose of showing that defendant's fingerprints were in the general fingerprint file of the Federal Bureau of Identification in Washington, D. C., where no single print file is kept of any person or persons except those convicted of bank robbery, extortion or kidnaping.

The conviction record of defendant on the counterfeiting charge and confidential data to the Department of Justice, placed hereon while it was in the master file of the Federal Bureau of Investigation appeared on the opposite side of that card, which record was concealed by a piece of white paper firmly sealed thereto, for the reason that the conviction of the offense of counterfeiting and the reversal thereof were in no way connected with the crime for which defendant was being tried in the trial court, and accordingly properly not admissible in evidence.

The bill of exceptions discloses that defense counsel Margiotti insisted that the paper be removed from the record side of he fingerprint identification card, and the record thereon disclosed, and that he removed it thereafter, and stated to the jury that defendant's conviction on the charge of counterfeiting had been reversed, and there is no evidence of other reference made thereto during trial, either in an attempt to introduce evidence in support thereof or by argument of counsel.

The trial judge refused to admit defendant's Exhibit 30, a certified copy of the record of the United States District Court of Michigan and the opinion of the United States Circuit Court of Appeals of the same state reversing defendant's conviction on the charge of counterfeiting, offered for the purpose of refuting evidence of his conviction thereof, on the ground, and we believe rightly so, that there was no evidence of such conviction, offered by the state, to refute.

We cannot agree with the contention of defense counsel that "the state having introduced into evidence Exhibit A-3 in the shape in which it was at the time, with the reverse side covered with a white sheet of paper, was not affording the defendant a fair trial"; or that state's exhibit was only introduced for the purpose "to prejudice the accused", and "served no additional purpose", or was admissible for the purposes of showing why he had been known under assumed names, or was improperly charged with the commission of crime; or that the court committed prejudicial error in admitting State's Exhibit A-3 when State's Exhibit S, which contained defendant's fingerprints, was already in evidence.

Though submitting to the jury some special requests to charge before argument tendered on behalf of the defendant the trial judge refused to submit to the jury nine others in which he was asked to charge the jury, "that no class of testimony is more uncertain and less to be relied upon than that of identity evidence"; that "one of the most difficult problems of the administration of justice deals with that of identify of a defendant"; that "the jury cannot find defendant guilty of any crime merely upon suspicion"; that "opinion testimony of fingerprint experts as to the correspondence of fingerprints is not sufficient basis for a conviction"; that the "jury was not required to find in accordance with the opinion of the state's expert witness Latona"; that "the jury must receive the testimony of expert witnesses with great caution"; that "opinion evidence of experts is of a lower grade"; that "the jury might refuse to believe the testimony of Latona"; that "defendant had offered evidence of good character for peace and quiet, and that it was the jury's duty to acquit him if after consideration of all the evidence in the case, including the character evidence, it entertained a reasonable doubt as to his guilt"; and that "the state had failed to prove any motive for the crime and as to the effect of the absence of motive".

It was the jury's duty to consider all the evidence and place the value it desired upon any of the evidence or exhibits submitted to it, and its right to believe or disbelieve any witness it heard. The trial judge had no duty nor right to comment upon any of the evidence nor suggest to the jury the weight it should give to any particular evidence submitted to it, nor discount any such evidence, nor suggest nor indicate to the jury in any manner what testimony it should consider, nor what testimony was not worthy of their belief, nor charge the jury nor even suggest to it that it must receive the testimony of expert witnesses with great caution, nor that opinion evidence of experts is of lower grade as he was asked to charge the jury in some of defendant's special requests to charge (numbers 1, 2, 3, 9, 10, 11, 12 and 13). In his general charge to the jury the trial judge fully covered the propositions of law which he was asked to submit to the jury in the special requests to charge (numbers 9, 13 and 16) which he refused to submit to the jury.

The trial judge was under no duty, and had no right, to emphasize testimony relative to defendant's character, good or otherwise, more than above stated he had any right to emphasize any other testimony or evidence submitted to it, which disposes of defendant's request to charge number 14.

While motive is not a necessary element of any crime, and the state was not required "to prove any motive" of defendant "for the crime", nevertheless the trial judge charged the law applicable to the question of motive or absence of motive in this general charge fully, and properly charged the jury that the presence or absence of motive is a circumstance to be considered with all the other evidence and facts submitted to it in determining whether defendant was guilty of the commission of the crime with which he was charged.

We are aware of the provisions of subdivision 5 of Section 13442-8, General Code, that "when evidence is con-

cluded, either party may request instructions to the jury on the points of law, which instructions shall be reduced to writing if either party requests it"; but concur in the reasoning of the court in the case of Kahoun v. State, 33 Ohio App. 1, 168 N. E. 550, that the "trial court's refusal of special requests for charge on part of defendant, where request was made at conclusion of evidence, was discretionary under" former General Code Section 13675 (5); and that "the court may in the exercise of its discretion in a criminal case give one or more special charges requested by counsel before argument, and refuse others", O'Mara v. State, 16 Appeals 62; and further that the provisions of this section "are discretionary and not mandatory" as held in State v. Weger, 25 Ohio Law Abstract 49.

> "Section 13675, General Code, authorizes, but does not require, the trial court to charge the jury at the conclusion of all the evidence and before argument upon points of law applicable to the case requested by the state or the accused, and the refusal to so charge does not constitute error." Maranda v. State, 17 Ohio App. 479.
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> "Court is not required to give special instructions in criminal cases before argument." Hornsby v. State, 29 Ohio App. 495, 163 N. E. 923.
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> "While the legislative intent is not clear, this court, in Blackburn v. The State of Ohio, 23 Ohio St., 146, held that the court is not bound to deliver such charge until after the argument. We are inclined, to the end that the uncertainty as to its meaning be settled, to interpret it farther and are of opinion that in the trial of criminal cases the statute authorizes but does not require the giving of a proper charge before argument upon the request of counsel for either party as to the point requested, and so hold." Wertenberger v. State, 99 Ohio St., 353, 124 N. E. 243.
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> "It has been settled by this court in the case of Wertenberger v. State, 99 Ohio St., 353, 124 N. E., 243, that under Section 13675, General Code, it is not mandatory upon the court to give any instructions to the

jury in a criminal case before argument. This declaration has never been overruled and this court is at this time in full accord with it. That case did not decide, nor has any other case decided by this court declared, that a request made before argument may be ignored in the general charge. Neither has it ever been declared that it is necessary that the request be renewed after argument." Grossweiler v. State, 113 Ohio St., 26 at 48.

"The court is not required to give special charges before argument in a criminal case." Balzhiser v. State, 35 O. L. R. 120, 121.

"Trial judge in criminal cases is not required to give requested written instruction in advance of argument, nor to incorporate them literally in general charge." Briseno v. State, 36 Ohio App. 459, 173 N. E. 617.

We conclude that the trial judge did not commit error prejudicial to defendant in refusing to submit to the jury the special requests to charge before argument tendered by defendant and rejected by him.

The trial judge sustained the defendant's objection to the state's testimony that Mrs. Vincent was in fact Mrs. Monazum, proffered for the purpose of contradicting testimony of the defendant's witness that a photograph, State's Exhibit A-7, was Mrs. Vincent when in fact it was Mrs. Monazum. In sustaining such objection the trial judge stated that he could not recall what testimony was introduced with reference thereto and told the jury it was its duty to remember whether the testimony to which reference was made was in the record.

In his argument to the jury, one of counsel for the state referred to Mrs. Vincent as Mrs. Charles Monazum, which reference counsel for defendant claims constituted misconduct of State's counsel and resulted in prejudice to the defendant necessitating this court reversing the judgment of the trial court.

We have read the record with reference to what transpired and the remarks of counsel of which complaint is made, and it is clear to us that counsel for the state had no intention to prejudice the rights of defendant in any way by referring to Mrs. Vincent as Mrs. Charles Monazum, her correct name, and conclude that such inadvertent reference was of such a minor nature as not necessarily or probably to mislead the jury to the prejudice of defendant.

There is evidence that defense counsel, Margiotti referred to state's witness Latona as a "superman" during trial, and on one occasion said "it amounts to saying, 'I'm perfect and nobody dares say that I am not perfect.' That's what it amounts to. It amounts to a 'superman' ".

Again during argument to the jury one of counsel for the state said:

> "Now, you have, for seven long hours, had an opportunity to observe Latona on the stand under cross examination; and I don't believe he uttered one word that was not true. His testimony was not in any way, to my way of thinking, discredited; and if we arent's going to believe the Federal Bureau of Investigation in matter of identification of fingerprints, who are we going to believe; and I resent anyone ridiculing that organization, because they have certainly done an outstanding job in this war, in protecting us, and are doing it today in the matter of criminal identification."

Counsel for defendant contend that the stated portion of State's counsel's argument was improper and deprived defendant of a fair trial. The argument of counsel for defendant is not before us, and since the claimed offending counsel states by brief that the quoted portion of his argument was made in answer to the argument of defense counsel we cannot ascertain that, and will not disturb the verdict of the jury on this ground. In any event, we believe that defendant's guilt was established beyond *any* reasonable

doubt, and that the argument of state's counsel under discussion was so inconsequential as not to have influenced the jury to defendant's prejudice. See Section 13449-5, General Code; State of Ohio, Appellant v. Witsel, Appellee, 144 Ohio St. 190.

The third complaint made by defense counsel under this assigned ground of error is that during his closing argument one of counsel for the state said to the jury that it might recommend mercy even though it found defendant guilty of first degree murder, and contends that "although no objection was taken by the defendant, at the time when it was made, the remark was so flagrantly unjust and improper as to require a verdict obtained by such statement to be set aside on a motion for a new trial."

Of course, it was the duty of defense counsel to protect the record they were making, and there is nothing before us which convinces us that a verdict against defendant was "obtained by such statement", making it mandatory for the trial judge to set the verdict "aside on motion for a new trial".

In a capital case the jury has a duty to consider the punishment in the event of first degree murder, and it is believed, that in this case, the argument of counsel, of which complaint is made, did not prejudice defendant's rights or deprive him of a fair and impartial trial. See 53 American Jurisprudence, Volume 53, Page 373, Section 467. Also see Section 13442-9, General Code.

Defense counsel filed notice of alibi but did not state therein the place where defendant claimed to be at the time the crime, with which he was charged and for which he was convicted, was committed, and as far as we can ascertain from the bill of exceptions introduced no evidence indicating that he was at some other place, or at any particular place, at such time, except that he was living in Youngstown and was in and about Youngstown at or about that

time, which in our opinion does not constitute evidence of alibi. During argument on the state's motion to "make the alibi more definite and certain" defense counsel Margiotti said "all we can do is say he was in Youngstown and that he was at a particular place at the time this alleged crime was committed is humanly impossible".

In accordance with the provisions of Section 13442-9, General Code, in our opinion the trial judge stated all matters of law necessary for the information of the jury in giving its verdict, and informed the jury that it was the exclusive judge of all questions of fact; but did not charge the jury on the defense of alibi, which counsel for defense claims rendered the general charge of the trial judge prejudicially erroneous.

We have read and examined the general charge with care, and we cannot quote therefrom further and hope to keep the length of this opinion within reasonable bounds. Further, we believe no useful purpose would be served by doing so. Accordingly, we content ourselves with saying that we conclude that the trial judge did not err "prejudicially" in his "general charge to the jury" in the respects charged by defense counsel. In addition, this matter is one of omission, and it becomes the duty of defendant's counsel to call the attention of the trial court to such omission.

During deliberation the jury requested the trial judge in writing to instruct it further whether "the State's Exhibit A-6" was "evidence or comparison", and whether it "should * * * have evidence of the coroner's inquest." The trial judge conferred with counsel for the respective parties late in the evening of the day when such requests were made, during which it was agreed that the jury should be instructed that it should not "have evidence of the coroner's inquest". The trial judge refused defense counsel's request to instruct the jury that State's Exhibit A-6 should be compared, or that the jury could compare it; but by

agreement of counsel instructed the jury as hereinafter set forth that such exhibit was evidence which it could consider together with all the evidence in the case, and in that respect complied with the request of defense counsel. In the absence of the court reporter the trial judge, with the consent of defense counsel, wrote and sent such instructions to the jury without the presence of defendant, who was in the county jail.

Fearful lest defense counsel was powerless to waive the right of defendant to be present when the jury was thus instructed, immediately after sending the stated written instructions to the jury room, the trial judge called the jury into open court, had them seated in the jury box, and in the presence of the defendant, his counsel, the prosecutor, and the court reporter instructed the jury as he had in his written instructions sent to the jury room.

Defense counsel made no objection to that procedure, but now contend that "the court erred in giving additional instructions to the jury", and cite authorities to support their contention "that the accused herein had a right to be present at all times during the course of the trial when anything was said or done affecting him, and that the giving of additional instructions in his absence was a violation of this right, affording a ground for new trial"; and that "the giving of these instructions in the absence of the defendant was a violation of his privilege to be present at every stage of the trial"; and urges it must be "presumed that he was prejudiced by the giving of the instructions on the first occasion in his absence"; and that the trial judge erred in his instructions.

The fundamental purpose of the presence of the defendant in court is to object to anything he considers erroneous or detrimental to his rights as an accused.

> "The test to be applied, in determining whether statute providing that a person tried for felony shall

be personally present during the trial has been violated, is whether the interest of defendant has been affected by the action of the court in defendant's absence." Rogers v. Commonwealth, 31 S. E. (2nd) 576, syllabus 1.

In the case of Edmonds v. Commonwealth (Court of Appeals of Kentucky), 264 Southwestern Reporter 1100, it appeared that during the progress of the trial "a recess was taken that the court might have time to prepare its instructions, and during the recess the appellant was remanded to jail. After the recess the court read to the jury the instructions that had been prepared, and the attorneys for the defense began their argument, before it was discovered that the appellant was not in court. The court stopped the proceedings immediately, had the appellant brought into court, and then started to reinstruct the jury. The appellant's counsel, in his presence, waived this, and continued with the argument. It is now insisted that by this the appellant was deprived of one of the rights guaranteed him by section 11 of the Constitution."

In that case it was held "accused's counsel could then in accused's presence waive reinstruction to jury; no constitutional right being thereby waived."

"Where verdict of guilty was received in accused's absence, but jury was kept intact until accused was brought into court, and verdict was read again in his presence, accused's constitutional right to be present during trial was not violated." Morris v. State, 170 S. E. 217.

"Where verdict of manslaughter was inadvertently read and jury were polled (as was done in the instant case) by defendant's attorneys in defendant's absence, but within a few minutes defendant's presence was procured, jury were reassembled, and same verdict, without further consideration by jury, was read and jury were polled, defendant's substantial rights held not prejudiced." Gray v. Commonwealth, 70 S. W. (2nd) 970.

> "It is not error for the trial court, in a capital case, to re-read to the jury a portion of the testimony and of the charge in the temporary absence of the defendant but in the presence of defendant's counsel, at the request of the jury; no step original in its character being taken." State v. Nardella, 154 Atl. 834.

In this case we believe counsel for defendant and defendant waived reinstruction to the jury during which time both were present by failing to object, and under the law and the evidence in this case defense counsel by his action in consenting that the trial judge should send instructions to the jury in the first instance, and failing to object to his reinstructing it in open court thereafter, waived any error that might have been committed in the first instance, and that "no constitutional right" of defendant was waived by any of the named acts of his counsel or omissions to act on their part.

Considering the evidence in this case in its entirety, and that with respect to the assigned ground of error under discussion specifically, and the authorities we have cited we reach the conclusion that the interest of the defendant was not prejudicially affected by what the court did during defendant's absence as hereinbefore set forth herein. If the trial judge erred in refusing to properly instruct the jury, as defense counsel contend he did, it was their duty to object, which as stated they failed to do.

The question presented by this assignment of error is troublesome, and we are aware it is a borderline question, but we are persuaded that the great weight of authority supports the conclusion we reach with respect thereto, which of course is based solely upon the facts in this case as disclosed by record submitted to us.

Finally we come to consider and dispose of defendant's ninth and last assigned ground of error, which together with subdivisions total thirty-six errors complained of, which last claimed error is that the verdict of the jury and

judgment of the trial judge entered thereon are against the manifest weight of the evidence. The 1513 page bill of exceptions submitted to us for review has been read carefully, the evidence weighed and measured with care, the numerous exhibits attached thereto studied pains-takingly, and the entire bill of exceptions scrutinized and considered, and the conclusion reached that considering the damaging evidence properly admitted against defendant in the trial of this case the verdict of the jury and judgment of the trial judge entered thereon are certainly not against the manifest weight of the evidence.

We learn from the transcript of the docket and journal entries that the trial was called and commenced in the court of common pleas on the twenty-fifth day of March, 1946, and that the case was submitted to the jury and it returned its verdict on the eighth day of April following. The bill of exceptions is voluminous, the objections unusually numerous and technical in nature, and the case an exceptionally long, hard fought and ardently tried one. After careful consideration of the record, the contentions of the respective parties and all papers submitted to us it is difficult to conceive how this case could have been tried without the intervention of some error. However as the result of the stated careful consideration of this case in its entirety we conclude that such error, if any, was not prejudicial in nature, and that defendant's guilt was established beyond a reasonable doubt regardless of any error that might have intervened; and can not say that it affirmatively appears from the record that defendant was prejudiced thereby, or was prevented from having a fair trial, and under "the circumstances this court can not hold that substantial justice has not been done." See Section 13449-5, General Code. See also State of Ohio v. Jones, et al, 145 Ohio St. 136 at 143.

The judgment of the court of common pleas is affirmed.

CARTER, *P. J.*
NICHOLS, *J.*, concur in Judgment.